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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA.

BY
GEORGE GREENE,
ONE OF THE JUDGES.

VOL. II.

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Sixth District.

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CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT OF THE STATE OF IOWA,

BURLINGTON, MAY TERM, A.D. 1849,

In the Third Year of the State.

Present:

HON. JOSEPH WILLIAMS, *Chief Justice.*
HON. JOHN F. KINNEY, } *Judges.*
HON. GEO. GREENE, }

HUGHES *v.* MILLER.

When a nonsuit or default is set aside, notice must be served on the party at least six days before the new trial. But this notice may be waived by general appearance of the party.

Party cannot object to defective notice after he consents to have a jury called. A judgment by default for costs may be set aside and the entire case re-adjudicated.

A trial of the right of property cannot be had, under the statute, after the property has been sold and possession passed to a third person, by virtue of legal process.

In a proceeding to try the right of property taken on execution, a judgment by default against the claimant will authorize the officer to proceed with the sale.

ERROR TO LEE DISTRICT COURT.

Opinion by WILLIAMS, C. J. This action was instituted by James Miller, by his agent, W. M. Andrews, against

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Ross B. Hughes, under the provisions of the statute for the trial of the right of property seized under execution. Rev. Stat., 331.

The facts of the case are briefly set forth in an agreement of the attorneys and the bill of exceptions. The agreement of the attorneys is as follows :

“ It is agreed to admit on this trial as evidence, that there was a judgment on the docket of Zadock Smith, a justice of the peace of Lee county, in favor of Ross B. Hughes and against William M. Andrews, on which execution issued and was levied upon the buggy in dispute. That claimant Miller on his trial was nonsuited, as mentioned in the justice’s transcript. That on the 6th day of March, 1847, the said nonsuit was ordered, and on the 8th day of March, 1847, the buggy was sold under the levy aforesaid to Callowhill E. Stone, and possession given by the constable; and that on the 11th of March, 1847, nonsuit was set aside and a new trial granted, as set forth in said transcript.” April 29, 1848.

The first error complained of in the proceedings below, is, that “ the summons issued by the justice was not served six days before the return day thereof, as required by the statute.”

Among other proceedings copied into the bill of exceptions, is the constable’s return as endorsed on the summons. By the return it appears that the service was made by the constable on the 15th day of March, 1847, and the day appointed for the trial of the cause, as specified in the summons, was the 20th day of March, 1847. This state of facts as to the service, gives the defendant at the utmost but five days’ notice. The statute prescribing the mode of procedure to be observed by justices of the peace in case of nonsuit and judgment by default, where such nonsuit or default is set aside and a new trial granted, requires notice to the opposite party of the setting aside thereof, and that “ the notice shall be served on the party or his agent six days before the trial, upon rehearing of the cause.” This service is therefore defective, and the objec-

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tion to it would prevail had not the party making it, by his own act, waived it. The record shows that the defendant appeared on the 20th of March, 1847, the day set for rehearing, and by his attorney demanded a jury trial; and that accordingly, a jury was called before the justice, in order to a full trial on the merits. The forms of pleading, as observed and required in the practice of the district court, are not necessary in trials before justices of the peace. After the commencement of a suit before a justice of the peace, the proceedings of the parties may be, and mostly are, oral. A proper entry of the material and important motions and acts of the parties concerned, is made in the docket of the justice, for the benefit of the parties in the legal adjustment of their rights. Here the record of the justice shows that, in obedience to the summons, and service thereof, the party appeared, and by his attorney consented to proceed to a trial of the cause by jury; that, after so consenting, he sought to take advantage of the defect in the service of the summons. This he could not do. If he sought to avail himself of this objection, he should have done so before he consented to, or requested the calling of, a jury. He might have appeared specially to object to the service, and then, upon doing so, if his objection was overruled, he might have stood on the defense, yielding no consent or acquiescence; and thus avoided a waive of the defect in service. *Conley v. Good*, Breese, 96; *Gun v. Wheeler*, 1 Seam., 555. Having consented, and elected to go to the jury with his case, he was bound by such election. His objection was too late. He had waived it.

The second error assigned is, that "after judgment by default had been entered by the justice for costs of suit, he reversed his judgment, and re-adjudicated the case by granting a new trial." The Rev. Stat., 324, § 3, authorizes the justice, in case of nonsuit or default, to open the case anew upon a proper showing of the party, within a specified time, according to the provisions of the statute. The record of the justice shows no error in this proceeding.

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The adjudication of the district court therein furnishes no ground of complaint for error here.

The third error assigned is, the refusal of the court to give the instruction to the jury which was asked for by the defendant's counsel, which, as appears by the bill of exceptions, was as follows :

The defendant asks the court to instruct the jury "that no trial of the right of property could take place between the parties to this suit, after the property had been sold upon legal process and passed to a third person, the purchaser;" which instruction was refused by the court, and an exception taken by defendant's counsel.

This provision is, by virtue of statutory provision, enacted for the protection of those who might be aggrieved by the officers of the law, seizing under execution process, their property, as the property of defendants, parties in the action and judgment upon which such execution had been issued. This proceeding, as the record shows, having been commenced by the plaintiff against the plaintiff in the execution, and in pursuance of the provisions of the statute, the constable and the execution plaintiff were duly notified of the plaintiff's claim to the property levied on. On the day set for the hearing, the plaintiff was nonsuited, and judgment was entered against him for the costs of suit. The property being a buggy, was in the possession of the constable by virtue of the levy made previously, and of course liable to sale to satisfy the judgment upon which the execution had issued, in the event of the claimant failing to make good his claim by judgment in his favor, in the proceeding under the statute. After the nonsuit, which was entered on the 6th day of March, 1847, and, on the 8th day, the same month, the constable, in obedience to the mandate of the execution, proceeded and sold the property to one Callowhill E. Stone, into whose possession it was then delivered. On the 11th day of the same month, the nonsuit was set aside, and a new trial granted by the justice at the instance of the claimant. The question here presented for adjudica-

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tion, is this: Did the property claimed by the plaintiff in this action continue to be subject to legal restraint in the hands of the constable, who held it by virtue of the execution and levy thereon, after the nonsuit and judgment for costs, so as to prevent the officer from proceeding to sell it? And did the renewing of the suit, by taking off the nonsuit, render the lien on the property good by reviving it, as it was at the commencement of the action?

The constable was bound by the requirements of the statute, which prescribes the duties of such officer, when the execution is put into his hands, to proceed promptly to make the money of the defendant by levy, on his goods and chattels. Upon making the levy, he is directed to advertise the property and sell it within a time certain, and to make his return to the justice. The claimant of the property, having availed himself of the provisions of the act of the legislature by notifying the constable of his claim, and the suit having been commenced thereon before the justice, further proceeding under the execution and levy was by law suspended until the termination of the trial of the right of property, (Rev. Stat., 332, § 11,) until the claim of the plaintiff in that proceeding should be "*abated, dismissed, or a final decision had thereon.*" The record shows that the constable did not proceed to sell the property until after the action had been disposed of by a nonsuit, and judgment for costs had been entered. Two days afterward he sold the property on the execution, and delivered possession thereof to the purchaser. This he had a right to do. The proceeding by which he had been restrained from selling the property levied on execution, was legally at an end, and the obligations of official duty were upon him. He was not bound to wait until the claimant might, at the last moment allowed by law, have the judgment of nonsuit set aside and his action recommenced. In a proceeding like this, the party seeking the benefit of the statute must be vigilant, and act with due regard for the rights of others interested, and the spirit of the law. The statute providing for the trial of the right of property,

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in terms not to be misconstrued, inculcates prompt and speedy action in the adjustment of the rights of the parties. By the entry of the judgment of nonsuit, the claimant was as much out of court, and his proceeding concluded, as if he had not commenced his action. This was the consequence of his own default, and it was his neglect, in not promptly recommencing his action, or opening the judgment of nonsuit, which left the property to be disposed of by the exemption process, and thus pass from the possession of the constable: when delivered to the purchaser, it was beyond the reach of the claim of the plaintiff under the provisions of this statute. In view of the spirit of the law, we can see no difference between the determination of the suit by abatement or dismissal, and default or nonsuit. In either case the party might commence again. The statute only holds the property in duress, and restrains the constable from selling, until the termination of the suit by claimant. There could be no certainty that the party claimant would renew the proceeding, more than there was that he might resort to some other mode of redress. In a proceeding like this, interfering with the ordinary process of law, involving the obligations of ministerial officers of the law, and the rights of parties in legal action, strict compliance with the statute, and a vigilant observance of the spirit of the law, should be inculcated.

We are of opinion, therefore, that the court below erred in refusing the instruction which was asked for by the defendant's counsel.

Judgment reversed.

Geo. C. Dixon, for the plaintiff in error.

J. A. C. Hall, for defendant.

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It is the right and duty of the judicial power in the state to declare all acts of the legislature, made in violation of the constitution, to be void.

The legislature of Wisconsin territory could not curtail rights conferred, nor confer rights withheld, by the ordinance of 1787.

Legislation in derogation of trial by jury, and by proceedings according to the course of the common law, is in conflict with that ordinance, and therefore void.

An act of the legislature of the territory of Wisconsin, entitled "An act for the partition of the half-breed land, and for other purposes," approved January 16, 1838, and an act supplementary thereto, approved June 22, 1838, and also an act passed by the Iowa legislature, approved January 25, 1839, to repeal both of said acts, are repugnant to the ordinance of 1787, and also to the organic law of Wisconsin and Iowa, and are therefore void.

So also are judgments rendered by virtue of said laws.

Void judgments are never binding, but judgments merely voidable may be enforced until reversed by a superior authority.

Judgments from courts of general jurisdiction cannot be collaterally impeached, unless absolutely void upon their face.

In an action of right, the plaintiff must recover upon the strength and validity of his own title, and should show a valid subsisting interest in the land. No such interest can accrue from a void judgment.

ERROR TO LEE DISTRICT COURT.

Opinion by KINNEY, J. This was an action of right, brought in the district court of Lee county, by the plaintiff against the defendant to recover the south-east quarter of section 2, in township 65 north, and range 5 west, within the tract of land known as the half-breed Sac and Fox reservation, in Lee county.

On the trial of the cause, the plaintiff in error having proved the defendant in possession of the land in controversy at the time of the commencement of the suit, for the purpose of showing title to the land, offered in evidence: First, the treaty between the United States and the Sac and Fox tribes of Indians, of date August 4, 1824, making a reservation of lands for the use of the half-breeds of said tribes of Indians.

Also, an act of Congress, approved June 30, 1834, en-

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titled "An act to relinquish the reversionary interest of the United States in a certain Indian reservation lying between the rivers Mississippi and Des Moines." Also an act of the territorial legislature of Wisconsin, approved January 16, 1838, entitled "An act for the partition of the half-breed lands and for other purposes." Also an act of the territory of Wisconsin, approved June 22, 1838, entitled "An act supplementary to an act, entitled An act for the partition of the half-breed lands, and for other purposes." Also an act of the territorial legislature of Iowa, approved January 25, 1839, entitled "An act to repeal an act of the Wisconsin legislature, entitled An act for the partition of the half-breed lands, and for other purposes," and an act supplementary thereto, approved June 22, 1838; which said laws, and the treaty aforesaid, were read to the jury, and embodied into, and made part of the bill of exceptions. The plaintiff also offered two judgments, under and by virtue of the act of the Iowa legislature, and the executions and returns thereon.

The Wisconsin act, repealed by the Iowa act, after reciting that it is expedient, in order to the settlement of the half-breed tract, and the validity of the titles of the claimants should be determined, and that partition of said lands among those having claims should be made, or a sale thereof for the benefit of such valid claimants, enacts that all persons claiming any interest in said lands, under said treaty and act of Congress, are required, within one year from the passing of the act, to file with the clerk of the district court of the county of Lee, Wisconsin territory, a written notice of their respective claims, designating the half-breed under whom they claim, and the extent of their claims, which notice was required to be accompanied with a true copy of all the title papers and deeds relating to the rights therein set forth.

Section 2 provides that Edward Johnston, David Brigham and Thomas S. Wilson shall be commissioners for the purpose of taking and receiving the testimony concerning

the validity of claims presented and filed, each of whom is to receive six dollars per day for his services.

Section 11 provides that all persons claiming any interest in said lands under said treaty and act of Congress, who shall not file their claims as required by the statute, shall be for ever barred from setting up any right in said lands, or in the proceeds of the sale thereof, &c.

Section 12 appoints certain commissioners with powers, under the order and direction of the court of Lee county, to make sale, &c., of the land.

The act of the Iowa legislature offered in evidence, after repealing in § 1 the foregoing act, provides that the several commissioners appointed under that act to sit and take testimony may immediately, or as soon as convenient, commence action before the district court of Lee county for the several accounts against the owners of the said half-breed lands, and give eight weeks' notice in the "Iowa Territorial Gazette" to said owners, of such suit; and the judge of the said district court, upon the trial of such suits at its next term, shall, if said accounts are deemed correct, order judgment for the amount and costs to be entered up against said owners, and said judgment shall be a lien upon said lands and a right of redemption thereto; and said judgment, when entered, shall draw interest at the rate of 12 per cent. per annum.

Section 3 enacts, that the word "owners" of the half-breed lands lying in Lee county shall be a sufficient designation in said suits.

Section 4 provides, that all the expenses necessarily incurred by said commissioners in the discharge of their duties under said act, shall be included in the accounts.

Section 5, that the trial of said suit or suits shall be before the court, and not by jury, and that the act shall receive a liberal construction, &c.

The judgments offered in evidence, obtained by virtue of said act of the legislature of the territory of Iowa, are as follows: "And afterwards, on the 30th day of August in the year 1839, the auditor appointed to examine and

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report in the case of David Brigham v. The Owners of the half-breed lands, having examined witnesses, &c., reports as follows, to wit: That David Brigham is entitled to receive from the owners of the half-breed lands the sum of \$818; all of which is respectfully submitted.

OLIVER WELD, *Auditor.*"

Whereupon the court accepted the said report, and ordered that the plaintiff recover of the said defendants the sum of \$818, the amount stated in the auditor's report, and costs in this behalf expended.

And in the case of Edward Johnston v. The Owners of the half-breed lands lying in Lee county, the report and judgment are as follows: Now comes the auditor appointed by the court to examine, adjust, and allow the account of the plaintiff in the above entitled cause, to wit, H. T. Reid, Esq., and makes report that he finds the sum of \$1290 to be due from said defendants to the said plaintiff, which report is accepted by the court; whereupon it is ordered by the court that the plaintiff recover of the defendants the sum of \$1290, together with costs of suit, &c.

The plaintiff also offered in evidence the execution issued upon the judgment in favor of Johnston, and the return thereon. The return is as follows:

"December 1, 1842. Levied the within execution on the half-breed Sac and Fox reservation in Lee county, L. T., commonly called the half-breed tract. Advertised the same for sale December 1, 1842. January 1, 1843, sold the above described tract of land, bought by H. T. Reid, for the sum of twenty-eight hundred and eighty-four dollars 66-100. Seventeen hundred and sixty-two dollars 66-100 to be credited in full satisfaction of the within execution.

HAWKINS TAYLOR, *Sheriff.*"

The plaintiff also offered in evidence the execution and return thereon in the case of Brigham v. The Owners of the half-breed lands, by which also it appears that, on the same day, the said sheriff sold the said reservation or tract of land to the said Reid for the same sum.

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The plaintiff then offered in evidence a sheriff's deed executed to him in due form on the 2d day of January, 1843, in pursuance of sales made under said executions, which embraced the land described in the declaration. The plaintiff also offered to prove that said land described in the declaration was within the half-breed tract, and part and parcel of the same, and that the same was included in the sheriff's deed, and in the said act of Congress of 30th of June, 1834.

To the introduction, as evidence, to the jury, of the said judgments, executions, returns thereon and sheriff's deed, the defendant objected, and the court sustained the objection, and refused to permit said evidence to go to the jury; whereupon the plaintiff excepted, and assigns the decision of the court excluding said evidence as error.

The statute regulating the action of right, provides that the plaintiff shall only recover upon the strength and validity of his own title. Rev. Stat., 431, § 45. Having, in order to a proper understanding of this case, and the important principles involved in the decision, noticed the evidence offered by the plaintiff to sustain his action, the treaty, act of Congress, and the acts of the Wisconsin and Iowa legislatures, relied upon by him, we will examine the questions so elaborately and ably discussed in the trial.

By the counsel for the defendant in error, it was contended that the Wisconsin and Iowa acts were unconstitutional, and consequently all proceedings under them absolutely void. While, upon the other hand, the unconstitutionality of the acts was not only denied, but it was claimed, even if they were not constitutional, as the court rendering the judgments possessed general jurisdiction, it necessarily decided in favor of its jurisdiction, and if that was error, the party could have been relieved in an appellate court, upon writ of error; and that the propriety of the judgments could not be collaterally questioned.

Although many points have been made in this case, those which we deem most important are: First, Were the acts of the Wisconsin and Iowa legislatures within the

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power conferred upon them by Congress, and in conformity with the ordinance of 1787? Second, Did the district court of Lee county acquire any jurisdiction, under the Iowa act, to render the judgments which it did render? Third, Can the judgments so rendered be collaterally impeached? And, fourth, Did the sale, under the executions issued on said judgments, pass any title to the plaintiff in error?

The Wisconsin act is based solely upon the assumption of the Wisconsin legislature, that it is expedient, in order to the settlement of the half-breed tract, &c., that titles should be investigated and partition and sales made, and upon this assumption commissioners are appointed to examine the titles, with power to administer oaths, take affidavits, issue commissions for taking depositions, issue subpoenas and other process to compel the attendance of witnesses; and for this purpose they were clothed with as full and ample power as was possessed by the district court.

The act of the Iowa legislature, although it repeals the Wisconsin act, yet it provides the manner in which the commissioners, who were appointed under that act, shall proceed to collect the amount, which the legislature presupposes to be due them, for services rendered in ascertaining the titles to the half-breed lands, and therefore dependent upon the rights presumed to have accrued under the latter for its operation.

While it is the duty of courts of justice studiously to ascertain the intention of the legislature, when called upon to give construction and judicial sanction to their enactments, and as courts have, and will with great reluctance pronounce them unconstitutional, yet the books afford abundant instances in which courts have been constrained to declare the most solemn legislative acts but gross violations of the fundamental law of the land. It has accordingly become a settled principle in the legal polity of this country, that it belongs to the judicial power, as a matter of right and duty, to declare every act of the legislature

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made in violation of the constitution, *or of any provision of it, null and void.* 1 Kent Com., 450.

Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty that resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it, and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void. *Taylor v. Porter*, 4 Hill, 140.

In this country, written constitutions form the basis of the general and state governments. From them, each branch derives its power, conferring on *each* department certain duties, restricting each within certain prescribed and limited sphere of action; the authority thus delegated cannot be passed with impunity.

The legislature, as an important integral part of the state organization, derives all its sovereignty from the constitution which created it. It can make laws, but cannot subvert the constitution, which is the written will of the people, the supreme law of the land, and all legislation must be conformable with its provisions, if not, the act does not possess the least virtue or validity whatever. But as members of the legislature, in the discharge of their duties, act under an oath to support the constitution, nothing will be presumed in favor of the unconstitutionality of a law. The violation should be clear and apparent before the act should be declared void. And to the judicial department of the government is entrusted the power to decide all questions of constitutional law.

The act of Congress establishing the territorial government of Wisconsin, provided that the legislative power of the territory should extend to all rightful subjects of legislation.

The act also provided that the inhabitants of said territory should be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to

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the people of the territory of the United States, north-west of the river Ohio, by the articles of compact contained in the ordinance of the government of said territory, passed on the 13th day of July, 1787, and should be subject to all the conditions, and restrictions and prohibitions in said articles of compact, imposed upon the people of said territory. By that solemn instrument it is ordained and declared, among other things, that for extending the fundamental principles of civil and religious liberty which form the basis, wherever these republics, their laws and constitutions, are established, to fix and establish those principles as the basis of all laws, constitutions and governments which for ever shall be formed in said territory, the inhabitants of said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of a trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law.

All the legislation of the territory of Wisconsin should have been consistent with the principles engrafted into this charter of human rights and civil liberty. The legislature could not curtail any rights conferred upon the people by the ordinance, nor confer any rights withheld.

The great landmarks of national liberty, trial by jury, and judicial proceedings according to the course of the common law, so wisely secured to the inhabitants of the territory by the ordinance, were insuperable barriers against legislative encroachment. With the same propriety might the legislature attempt to take from the citizen the benefit of the writ of *habeas corpus* as to forbid the right of trial by jury, and as well deny him religious freedom as to attempt to divest him of his property without judicial proceedings according to the course of the common law. Hence all legislation in derogation of these rights is unconstitutional and void. But the ordinance of 1787 further declares, that no man shall be deprived of his liberty or property but by the judgment of his peers or the laws of the land.

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Law, Blackstone defines to be a rule, not a sudden transient order from a superior to, or concerning a particular person, but something permanent, uniform and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or attain him of high treason, does not enter into the idea of a municipal law, for the operation of the act is spent upon Titius only, and has no relation to the community in general. It is rather a sentence than a law; and Lord Coke, in commenting upon the celebrated 29th chap. of Magna Charta, says no man shall be deprived, &c., unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land, (to speak it once for all,) by due course and process of law. The phrase, law of the land, is thus defined by an author: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. Everything which may pass, under the form of an enactment, is not therefore to be considered the law of the land. If this were the case, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, and decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. The administration of justice would be an empty form—an idle ceremony; and judges would sit to execute legislative judgments and decrees, not to declare the law, or administer the justice of the country."

In the case of *Hoke v. Henderson*, 4 Dev., 15, Chief Justice Ruffin also says, that statutes which would deprive a citizen of the rights of person or property, without a regular trial according to the course and usage of the common law, would not be the law of the land in the sense

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of the constitution. Judge Bronson, in the case of *Taylor v. Porter*, 4 Hill, (in speaking on this subject,) says the meaning of the section there seems to be, that no member of the state shall be disfranchised or deprived of any of his rights or privileges unless the matter shall be adjudged against him upon trial had according to the course of the common law.

Did the act of the Wisconsin legislature seek to deprive the owners of the half-breed lands of their property by judicial proceedings according to the course of the common law? If not, the act was in conflict with the supreme law of the land, and could not have been enforced.

The act appointed three commissioners to examine and report to the district court of Lee county upon the titles set up to the half-breed lands. All persons owning any interest in said lands were required to file with the clerk of the district court a written notice of their respective claims. It was made the duty of the commissioners under the act to take and receive testimony concerning the validity of claims thus presented and filed, and report to the court the names of the owners, and the proportions to which each was entitled, &c. The act made it imperative upon the court to render judgment at the next succeeding term after filing the report in favor of the claimants, for the amounts to which they were respectively entitled, according to said report, unless exceptions were filed by the fourth day of said term. And by said act, all persons claiming any interest in said land, under the treaty and act of Congress, who did not file their claims as aforesaid, were forever barred from setting up any right in said lands, or the proceeds of the sale thereof. The act also appointed certain commissioners, authorizing them, or a majority, to proceed and make sale of said lands, from time to time, according to the judgment or order of the court, to make surveys, &c.; and they were authorized, upon the receipt of the consideration of the sales, and ratification of the report by the court, to execute and deliver to the purchasers proper deeds, which should be effectual to vest in the re-

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spective purchasers the absolute title in fee simple in severalty of the lands so sold and conveyed free and clear of all right and claim of all persons under said treaty and act of Congress. All expense of the proceedings were required to be paid out of sales, &c. The act also provided that the jurisdiction of the said court, in the matter referred to in said act, should be exclusive, and *that no proceeding should be instituted or sustained in that or any other court, either at law or equity, under the general law relating to the partition of lands, for the purpose of effecting the partition or sale of said lands.*

We have no hesitation in coming to the conclusion, that this act, under which Johnston and Brigham's services were rendered in ascertaining and reporting upon the title to the half-breed lands, was a most unwarrantable assumption of legislative power. It proceeds upon the hypothesis that it is necessary to ascertain and settle the title to certain lands. For this purpose, commissioners are appointed and clothed with most extraordinary authority.

The judgment of the court upon their report is to settle the title to more than one hundred thousand acres of valuable land, not by any proceeding according to the course of the common law, not by service of process, by which the parties could have a day in court, not by a general law of the land, operating upon the whole community alike, but by a special and limited act, violating all of these valuable safeguards.

The act wrested from the court all judicial discretion, as it was required in unqualified terms to render judgment in *favor* of the claimants, for the amount the said commissioners should report them entitled to.

This wonderful legislation does not stop here; but if persons who held good and valid titles to said lands did not file their claims as required by the act, they were forever barred from setting up any right in said lands, or the proceeds of the sale thereof.

All equitable and legal proceedings under the *general law* of partition were forbidden. Sale commissioners were

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appointed, with full power to sell said lands, and in this manner was title to be divested and imparted.

Thus, A owning a good and valid title in said lands, who neither consented to the act or proceeding, not having incurred any legal liability, if he should fail to file his claim, he would become disseized of his freehold, deprived of his estate, and all for the reason that he did not file his evidence of title. There was no public necessity for such an act. The general partition law was available for the purpose of ascertaining and settling the various interests of those holding titles in said lands; and if such a pretence as the one assumed by the legislature for the passage of this act were a justification, then, indeed, with the same propriety might they pass an act requiring the owners of a particular block of lots, the title to which might be in controversy, to file their respective titles, and if either of them failed to do so, the penalty should be a forfeiture of the interest owned.

The power assumed by the legislature in this act, if sustained by the courts, would lead to the most fearful consequences, as it would enable them at will, by special and limited laws, to settle all controversies of title, and to bring about this object the property of one person could be taken against his consent, and given to another. In the case of *Wilkinson v. Leland*, 2 Peters, 657, Judge Story says, "that government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body without any restraint." The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred; at least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very

strong and direct expression of such intention. The power of the Wisconsin legislature was derived from Congress, which extended to all rightful subjects of legislation, and subject also to all the restrictions and provisions of the ordinance of 1778. The organic law conferred no power on the legislature to pass such an extraordinary act. In the case of *Taylor v. Porter*, 4 H^{ill}, 144, Judge Bronson says, "we know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state in this Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every tribunal in which it has been attempted to be enforced. The security of life, liberty and property lies at the foundation of the social compact, and to say that this grant of legislative power includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of legislative power."

Laws affecting life, liberty and property must be general in their application, operating upon the entire community alike. It is the boast and pride of our institutions that we have no favored classes; no person so high that he does not require the care and protection of the law, no person so low as not to be entitled to them. The life, liberty and property of one citizen rest upon the same legal foundation as those of another, and if these are taken from him, it must be by a law which operates upon all alike. If it were otherwise, all would be at the mercy of legislative power, and the dearest rights of the citizen would not be worth possessing.

Whatever might have been the exigencies which would seem to require an act to settle the different conflicting titles to the half-breed lands, still the legislature had no right, under the organic law and ordinance, to pass a

special and limited act confined to a particular class of individuals, by which they were to be deprived of their property. In common with all other persons of the territory, the owners of these lands could only be divested of them by judicial proceedings according to the course of the common law.

It was under this act that Johnston and Brigham performed their services, for which the entire tract was sold, and at said sale purchased by Reid, the plaintiff in error. As in our view the act was utterly repugnant to the ordinance of 1787, and was not within any express power conferred upon the legislature by the act of Congress, it was unconstitutional and void, and no rights could possibly have accrued under it.

Iowa, formerly constituting a part of the Wisconsin territory, passed into a separate territorial government in 1838, and the laws of Wisconsin, by the organic law, were extended over the new territory. The first legislature, by an act approved January 25, 1839, repealed the Wisconsin act, but provided that the several commissioners appointed by said act to take testimony might immediately commence actions before the district court of Lee county, for their several accounts against the owners of the said half-breed lands, by giving eight weeks' notice in the "Iowa Territorial Gazette" to said owners of such suits. The judge of said court was required, if said accounts were deemed correct, to order judgment for the amounts and costs to be entered up against said owners, which was to be a lien, &c., upon said lands. This judgment was to draw interest at the rate of 12 per cent.

The statute also provides that the words, "owners of the half-breed lands lying in Lee county," should be a sufficient designation and specification of the defendants in said suits. *The trial is required to be before the court, and not a jury.* By virtue of this act, Johnston and Brigham commenced their suits against the owners, &c., as such, and not against any person by name. There does not appear to have been any appearance in court on the part of the

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owners, when the judgments before mentioned were rendered, on which the said executions were issued, and the entire tract sold by the sheriff to the plaintiff in error.

The unconstitutionality of the Iowa act cannot well be controverted. It is not only nugatory of itself, but provides for the collection of claims which accrued under an unconstitutional law. The same act which invokes the aid of a court to render judgments in favor of invalid claims, denies to those whom it constitutes defendants, the right of a trial by jury. Instead of leaving the plaintiffs to pursue the remedy prescribed by the law of a land, the legislature assumes a power not delegated to it by the law of Congress, and in direct conflict with the provisions of the ordinance of 1787, and in violation of the general laws of the territory. The suits are not brought against persons by name, but against them as owners of certain property, and on notice by publication, judgments are rendered and lands sold to a large amount.

The general laws of the territory of Iowa authorized actions of debt to be prosecuted against defendants only in their proper names, and by personal service of process, and entitled them to trial by jury. The act of the Iowa legislature adjudged that the owners of the half-breed lands were indebted to the commissioners, and authorized them to sue such owners in the manner before mentioned, not by personal service, but by publication in a newspaper. The court is to ascertain of itself, and not by jury, the amount of the indebtedness, and to enter judgment for the same, which judgment is to be a lien on said land, and draw 12 per cent. interest, when the general laws of the territory only authorized 6 per cent. This is not according to the law of the land. Such legislation is inconsistent with the principles of free government, for it asserts a power on the part of the legislature entirely inconsistent with the liberty of the citizen. It is not within the scope of rightful legislation, for it does not profess to declare a general rule of action for the citizen, but is partial, limited and exclusive. It infringes the clause of the ordinance of

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1787, which guarantees judicial proceedings according to the course of the common law, and violates that clause of the ordinance which declares that no man shall be deprived of his liberty or property but by the judgment of his peers and the law of the land; and consequently it is utterly void. It could not confer any additional authority upon the court, it could take no power from it which it otherwise possessed. It could not rightfully create any new facilities for Johnston and Brigham to prosecute their claims, and their legal remedy was the same as if the act had not been passed; and as it was a dead letter upon the statute, no rights or immunities could accrue under it.

It is necessary to determine, then, whether the court had power and jurisdiction, under the act of the Iowa legislature, to enter the judgments which it did enter. It is not contended that the general laws of the territory gave the jurisdiction, or that it was conferred by anything except the said special act. This act we have shown to be unconstitutional and void, and it being the only act which attempts to confer authority upon the court to enter the judgments, it is necessary to inquire whether a jurisdiction thus conferred can be exercised, or in other words, whether an unconstitutional act can confer jurisdiction at all. In the case of *Malbury v. Madison*, 1 Cond., 267, Chief Justice Marshall lays down the doctrine in the following clear, pointed and forcible language:

“The question whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States, but happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established to decide it.

“That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.

“The exercise of this original right is a very great exertion, nor can it, nor ought it to be, frequently repeated.

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The principles therefore so established are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

“ This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by these departments.

“ The government of the United States is of the latter description. The powers of the legislature are defined and limited, and that these limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if these limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be controverted, that the constitution controls any legislative act repugnant to it, or that the legislature may alter the constitution by an ordinary act.

“ Between these alternatives there is no middle ground. The constitution is either a superior permanent law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

“ If the former part of the alternative be true, then a legislative act contrary to the constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

“ Certainly all those who have framed written constitutions, contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government *must be, that an act of the legislature repugnant to the constitution is void.*

“ This *theory* is essentially attached to a written consti-

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tution, and is consequently to be considered by the court as one of the fundamental principles of society.

“ If an *act of the legislature repugnant to the constitution is void*, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or in other words, though it be not law, does it constitute a rule as operative as if it was law? This would be to overthrow in fact, what was established in theory; and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the power and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

“ So if a law be in opposition to the constitution. If both the law and the constitution apply to a particular case, so that the court must either decide the case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules govern the case. This is of the very essence of judicial duty.

“ If then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

“ Those then who controvert the principle that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which according to the principles and theory of our government is entirely void, is yet in practice completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence,

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with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that these limits may be passed at pleasure.

“That it thus reduces to nothing what we have deemed of the greatest importance in political institutions, a written constitution, would of itself be sufficient (in America, where written constitutions have been viewed with so much reverence) for rejecting the constitution.”

But it was contended by the counsel for the plaintiff in error, that the constitutional question cannot now be raised. That the court rendering the judgments, necessarily decided in favor of the constitutionality of the act, and of its own jurisdiction, and that decision became the law of the case, and if it was error it could only have been inquired into on writ of error. From an examination of all the authorities referred to, we are satisfied that this position could not be successfully controverted, if the act by virtue of which the court rendered judgments were not void. But the act being in direct derogation of the constitution, did not confer any power upon the court to act in the premises. Hence all of its proceedings under it are not mere errors or irregularities, but absolutely void. There is a plain distinction in all books upon the subject, between judgments void and only voidable. The former may always be questioned when attempted to be enforced; the latter never after the limitation of the time prescribed for testing their irregularities, in a superior or appellate court.

The leading distinction between judgments and decrees void, and such as are voidable only, is, the former are binding nowhere, the latter anywhere until reversed by a superior authority. *Hollingsworth v. Barbour et al.*, 4 Peters, 466.

A party is not obliged to sue out a writ of error to reverse a void judgment. He may wait until the judgment is attempted to be enforced on proceedings under it, and then attack it collaterally. But with erroneous judgments it is different; if he sleeps upon his rights, his remedy is lost.

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The court possessed no power under the act to make any decision either in favor of its jurisdiction or for any other purpose. It is true, it was a court of general jurisdiction, and had jurisdiction over the action of debt, as was contended in the argument. But the proceedings were conducted exclusively under the act, and instead of leaving the court to exercise its general jurisdiction, it was required to render judgments if the said accounts were deemed correct. Its entire proceedings, as prescribed by the act, were essentially different from ordinary proceedings in actions of debt. The action of the court is based exclusively upon a void act, which is made a part of the record in this case; and as the court did not acquire any jurisdiction over the parties under the act, and could not rightfully enter up any judgment, the judgments are utterly void.

While, therefore, it is now well settled that judgments emanating from courts of general jurisdiction cannot be impeached collaterally for error or irregularities, still judgments absolutely void upon their face, emanating from the same courts, may be so impeached. All presumptions are in favor of the former, but nothing can be presumed in favor of the latter. *McComb v. Elliott*, 8 S. & M., 505; *Enos v. Smith*, 7 *ib.*, 85.

The case of *Voorhees v. The Bank of the United States*, 10 Peters, 449, so confidently relied upon by the counsel for the plaintiff in error, we think, when properly understood, sustains this position and enforces this distinction.

While Judge Baldwin, in delivering the opinion of the court in that case, lays down the doctrine with a perspicuity and power seldom surpassed in judicial decisions, that the judgment of a court of general civil jurisdiction cannot be impeached collaterally for mere errors or irregularities, he also says: "The errors of the court do not impair their validity: binding till reversed, any objection to their full effect must go to the authority under which they have been conducted. If not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act

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under color of law, which can properly be deemed to have been done *coram non judice*, that is, by persons assuming the judicial functions in the given case, without lawful authority. The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the case where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record purporting absolute verity, in the other mere waste paper."

The decision of the court in the above case sustained the judgment of the court of common pleas of Hamilton county, Ohio; but the court say, in speaking of the objection to the proceedings, "None of them effect the jurisdiction of the court, or its authority to order or confirm the sale; the acts omitted to be recited in the contract are not judicial but ministerial, to be performed by the clerks or auditors."

But the learned judge cites the decision of the court in *Thompson v. Tolmie*, 2 Pet., 157, in which the court declare "that the general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears in the face of them that the subject matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court to set them aside, or in an appellate court. If there is a total want of jurisdiction, the proceedings are void and mere nullities, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question."

In the case of *Rose v. Hemely*, 2 Cond., 100, in which the judgment of a foreign court was collaterally attacked, Chief Justice Marshall, in delivering the opinion of the court, says: "The power of the court then is of necessity examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the

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right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered." He also says, "Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or in other words, in its jurisdiction over the subject matter which it has determined. In some cases that jurisdiction depends as well on the state of the thing, as on the constitution of the court."

In the case of *Lessee of Hickey et al. v. Stewart et al.*, 3 Howard, 750, it was insisted that the jurisdiction of the court over the subject matter of the decree could not be inquired into by the supreme court, nor the court below, when brought before either collaterally. The decree collaterally assailed was rendered by the supreme court of the territory of Mississippi, decreeing certain lands to the heirs of Robert Starkie. One of the main questions before the supreme court of the United States was, whether this decree was void, the court having no jurisdiction of the subject matter of the decree, or only erroneous and voidable. The court say, if the former, then its validity was inquirable into in the current court when offered in evidence, and it ought to have been rejected. The court decide that the court rendering the decree had no jurisdiction, and that the whole proceeding was a nullity.

When a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void, and form no bar to a remedy sought even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law trespassers. This distinction runs through all the cases on the subject, and it proves that the jurisdiction of *any* court exercising authority over a subject may be inquired into in every court where

the proceedings of the former are relied on and brought before the latter, claiming the benefit of such proceeding. *Elliott et al. v. Piersall et al.*, 1 Peters, 340.

In the case of *Shriver's Lessee v. Linn et al.*, 2 How., 43, Judge McLane, in delivering the opinion of the court, says: "No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice would be treated as a nullity; and so must a sale of land be treated which has been made without an order or decree of the court, though it may have ratified the sale."

See also *Mills v. Martin*, 19 John, 7; *Shelton v. Tiffin et al.*, 6 Howard, 163, 3 John, 457; *Proctor v. Newhall*, 17 Mass., 81; *Bloom v. Burdick*, 1 Hill, 130.

In the last case the court declare that it is a cardinal principle in the administration of justice, that no man can be condemned or divested of his rights until he has had an opportunity of being heard. He must, either by serving process, publication notice, appointing a guardian, or some other way, be brought into court; and if judgment is rendered against him before that is done, the proceedings will be as utterly void as though the court had undertaken to act when the *subject matter* was not within its cognizance, and cites *Beman v. Fitch*, 15 John, 121; *Bigelow v. Stevens*, 19 *ib.*, 39; *Mills v. Martin*, *ib.*, 7. The court also say the distinction between superior and inferior courts is not of much importance in this particular case, for *whenever it appears* that there was a want of jurisdiction, the judgment will be void in whatever court it was rendered. *Hollingsworth v. Barbour*, 4 Peters, 466.

We have no hesitation, from our examination of the authorities bearing upon this important branch of the case, in assuming as the settled doctrine of the books, that judgments rendered without the court having acquired jurisdiction either over the subject matter or the parties, are mere nullities, and may be declared void by a competent tribunal whenever attempted to be enforced.

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In the case before us, the want of jurisdiction over the parties appears upon the face of the proceedings. Suit is brought and judgments entered against "*owners*" of certain lands.

Parties cannot be brought into court in this manner, and judgments cannot be so rendered. These judgments are void, as the court acquired no jurisdiction. Time cannot sanctify them, nor courts enforce them. For all judicial purposes they are as though they had not been rendered, and although the statute bars a writ of error, they neither bind nor conclude any one.

But it is said that Wright, the defendant in error, cannot object to the sale, &c., he being only in possession without pretence of title.

The statute regulating the proceedings in actions of right, provides that the plaintiff shall recover upon the strength and validity of his own title. Hence the plaintiff offered the treaty, act of Congress, legislative acts, judgments, executions and returns, in evidence. This was the source from which he claimed to have derived title. If the sales upon the execution did not confer title, he could not recover, even against a stranger. In order to entitle Reid to recover under the statute, he should have a valid subsisting interest in the land. As the judgments were void, no interest whatever passed in consequence of the sales under the executions, and therefore the plaintiff could not sustain his action against any one, and the court very properly, we think, refused to permit the evidence to go to the jury.

Other positions were taken by the counsel for the plaintiff in error, besides those we have noticed. The arguments and authorities were presented to the consideration of the court with great power and ability. But as the case has presented itself to our minds, we have not thought it necessary to notice them in this decision.

We have been fully impressed with the importance of this case to the plaintiff in error, who purchased these lands under a judicial sale, and fully felt all that reluctance

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which should ever characterize courts when they declare legislative acts unconstitutional, and judgments of courts void. Still it has been no less a duty to decide in favor of the judgment of the court below.

Judgment affirmed.

Henry W. Starr, C. Walker and H. T. Reid, for plaintiff in error.

Geo. C. Dixon, for the defendant.

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- It is not error to preclude an answer to irrelevant or immaterial evidence.**
 When actual notice is required by statute, evidence of constructive or implied notice is not sufficient.
- Actual notice can only be communicated by express information to, or personal service upon, the party interested.**
- A defective description of land in a levy is cured by a correct description in the sheriff's deed, when it shows that the land conveyed is the same on which the levy had been made.**
- A mere omission or irregularity in a sheriff's return cannot vitiate a sale made under execution, so as to invalidate the rights of a *bona fide* purchaser.**
- Sheriffs' returns of levy, &c., not essential to title.**
- Under the Michigan statute of 1827 in relation to conveyances, an unrecorded deed cannot prevail against a subsequent purchaser, who had his deed recorded first.**
- Under the registry law of 1840, no conveyance is valid except between parties thereto and such as have had actual knowledge thereof, until it is deposited for record.**
- Deeds executed before the registry act of 1840, should be recorded under it, the same as deeds executed subsequent to the passage of the law.**
- A judgment lien will hold against a prior unrecorded deed, without actual notice.**
- A deed for land first filed for record, though subsequently dated, will prevail.**

ERROR TO DES MOINES DISTRICT COURT.

Opinion by GREENE, J. An action of right, commenced January 16, 1846, by Joseph S. Burnam against Buckley

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C. Hopping. The suit was instituted and pleadings filed under statutory provisions. The cause was finally submitted to a jury, at the April term of the district court in 1849, and a verdict returned that the plaintiff had right to the immediate possession of the premises described in the writ and declaration. A judgment was rendered accordingly.

It appears of record, that the plaintiff below claimed title under a sheriff's deed, derived from a judgment rendered June 4, 1841, in favor of Daniel Crenshaw against Jeremiah Smith. Execution issued upon this judgment December 9, 1841. The land in question was levied upon, and on the 29th of January, 1842, it was sold to the plaintiff. The deed was executed on the 23d of January, and filed for record on the 9th of March, 1842. It appears that Smith, the defendant in execution, had purchased the land from the United States on the 16th of January, 1840.

Hopping, the defendant, claimed title to the land by virtue of a deed from said Smith, dated February 6, 1840; but the deed was not filed for record until March 14, 1842. The defendant also proved that he had been in actual possession of the premises, from the summer of 1839 until the spring of 1846.

It will be observed that both parties claim the premises in question, under Jeremiah Smith, by whom the land was entered; the plaintiff by judicial, and the defendant by voluntary sale. The principal question then to be determined is, which of the conveyances under the foregoing facts is entitled to legal priority? But as other questions were raised on the trial below, we will proceed to consider them in the order in which they are assigned as error.

1. Questions were propounded to a witness by the defendant, in relation to the time he had been in possession, and in relation to the sheriff's knowledge of his interest in the land. These questions being objected to, the witness was not permitted to answer them; and the court decided that the mere possession of the premises by the defendant, or his acts of ownership over them, were not sufficient to

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prove actual notice to the plaintiff of the defendant's purchase and deed from Smith. Where irrelevant or immaterial evidence would be elicited by a question, it will hardly be contended that the court erred in precluding an answer, and hence the objection to those questions was very properly entertained. If constructive notice of the defendant's deed from Smith could have been deemed sufficient under the statute, no doubt evidence of possession would have been admissible; for possession in such a case and acts of ownership would be considered sufficient notice to put the purchaser upon inquiry. But the proof required under the statute was of *actual* notice. Constructive or implied notice may be shown by a record authorized by law, by possession, by acts of ownership, and by other appropriate circumstances, which may impart notoriety of interest in the estate; but actual notice can only be communicated by express information to, or personal service upon, the party interested in the notice. There is no ambiguity in the language of the act. The law makers were not satisfied with the term "notice" without qualification, which would render proof of notice by construction or implication admissible; but they have in their wisdom left no opening for such proof: as they have in express terms required a different and more direct kind of notice. Laws of 1840, p. 39, § 31. The question proposed relative to the sheriff's knowledge of the defendant's interest in the land was also irrelevant. Even if established that the sheriff had notice of the deed from Smith to Hopping, it could not therefrom be deduced as a legal or logical inference, that Burnam had actual notice of such deed. In *Stahle v. Sphon*, 8 Serg. & R., 317, it was decided that notice to the sheriff at a sale of real property is not notice to the purchaser, and so in *Stanley v. Perley*, 5 Greenl., 369. The propriety of these decisions has not been questioned. Under this view, then, and under the conviction that evidence of possession is alike insufficient and inapplicable to establish *actual* notice as required by law, we can see nothing erroneous in this ruling.

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2. It is objected that the execution returns, and sheriff's deed, were improperly admitted in evidence, and in support of this objection it is urged that the levy and return of the sheriff are defective, and the land insufficiently described. The returns in this case were no doubt incomplete, and the description of the premises levied upon vague and uncertain. It sets forth the land as "a part of the west half of the south-west quarter of section six, in township sixty-nine, range two west, in Des Moines county, I. T." The question arises, on what part of the eighty acres described was the levy made? Such vagueness of description would have been adjudged void for uncertainty, on a motion made at the proper time to set aside the levy and return; and if the deed made under the execution had contained the same defective indefinite description, it could have conferred no title upon the purchaser. But the deed describes the land levied upon and sold, with reliable certainty, and thereby cures the defective return endorsed upon the execution. After commencing the premises in the ordinary form, the deed proceeds in these words: "I, the said James Cameron, sheriff as aforesaid, levied upon the following described tract of land, to wit: a part of the west half of the south-west quarter of section six, in township sixty-nine, north of range two west, in Des Moines county, commencing at the section post at the south-west corner of said quarter section, running thence north with the township line thirteen chains and forty-two links, thence east thirteen chains and forty-two links, thence south thirteen chains and forty-two links to the section line dividing sections six and seven in said township, and thence west with said section line thirteen chains and forty-two links to the place of beginning; containing eighteen acres," &c. The certainty with which the premises are described in the deed, and the averment that they were levied upon under the appropriate execution, show that the property sold was sufficiently identified at the sheriff's sale. But it was otherwise in *Throckmorton v. Moon*, 10 Ohio, 42, which is cited in support of the

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objection at bar. In that case the levy not only described the premises in general and vague terms, but the sheriff's deed contained equally indefinite and unreliable description. It described the land conveyed as 1055 acres in a tract of 1731 acres, located in the name of R. T. Neither the sheriff's return nor the deed designate what particular portion of the 1731 acres were levied upon and sold. It being impossible to ascertain either from the levy or deed what portion of the entire tract so vaguely described had been conveyed, the deed was very properly declared void for uncertainty. The other cases cited by counsel upon this point, we consider equally inapplicable to the present inquiry.

It has already been determined by this court, that an omission or inequality in a sheriff's return, cannot vitiate a sale made under execution so as to invalidate the right of a *bona fide* purchaser. *Humphreys v. Berson*, 1 G. Greene, 199, 215. In that case this court adopts the doctrine in *Doe v. Heath*, 7 Black., 156, in which the returns of the sheriff did not show who was the purchaser at the sale. The court in their opinion say, that if the party "relied upon the execution and return for proof that he was the purchaser of the land, and that were all the proof in the case to sustain his title, it would be insufficient. The sheriff's returns would not be sufficient to satisfy the statute of frauds. But a deed was made by the sheriff to Whitcomb as the purchaser of the land, and that is sufficient. A purchaser at sheriff's sale, who pays his money and receives a deed from the sheriff for the land levied on and sold, cannot be prejudiced if the sheriff make an imperfect return, or if he make no return at all." Guided by this rule, which we regard as salutary and just, it will be conceded that the objection urged in this case is completely removed. True, the return is defective; it omits a full description of the property levied upon and sold; but a deed is introduced in authentic form, which with ample detail fills the hiatus occasioned by the imperfect return, stamps with clearness the proceedings

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of the officer, and establishes the right of the purchaser. Besides it is a settled rule that the returns are not an essential part of the title in a sheriff's sale. If defectively made or not made at all, that fact will not impair a purchase which would be otherwise valid. So well established is this principle, so uniformly recognized by the most profound jurists, that a review of it at this day might be regarded as supererogatory. The supreme court of the United States, in the case of *Wheaton v. Sexton*, 4 Wheat., 503, say that "the purchaser depends on the judgment, the levy and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return or any return at all to the writ, is immaterial to the purchaser." No court has presumed to question the correctness of this decision. The highest tribunals have been guided by it in acting upon all sales made by judicial process. In this case the judgment and deed are conceded to be good, but it is claimed that the levy was defective, and therefore the purchaser acquired no title. We can see no serious defect in the levy. It cannot properly be considered defective, from the fact that imperfect returns were made. A levy precedes the returns and is independent of them. It consequently may have been good and upon specific property, even if incompletely, or in no way described by the returns. And independent of the presumption that an officer has done his duty until the contrary is shown, we learn from the deed, as before stated, that a levy was correctly made. When the purchaser at a sheriff's sale shows an authorized execution and deed, a correct levy will be presumed. It was held in *McEntire v. Durham*, 7 Iredell, 151, that a judgment, execution and deed from the sheriff are sufficient to support the title of a purchaser, without proof of a levy. And in *Evans v. Davis*, 3 B. Monroe, 344, it was held that if property is sold under execution, and there is no return that it was levied on, the law presumes a levy. Under these decisions the objections urged to the levy,

and to the admission of the execution and deed as evidence in the case, must be regarded as groundless. Even if it appeared that the levy was as defectively made as is contended, that could by no means justify the exclusion of the execution and deed. They were admissible in evidence, because essential links in a chain of evidence to establish title. If not sufficient, they were at least conducive proof relevant to the issue, and therefore admissible.

3. The next error assigned controverts the propriety of certain instructions which were given as asked by the plaintiff. The only points involved in these instructions about which there can be the slightest doubt, are those designated in the record as third and fifth. By the third, it appears that the court charged the jury that the deed offered in evidence by the defendant does not show a valid title in him as against the plaintiff, unless it is proven to the jury that the plaintiff had actual notice of the existence of said deed. As applicable to this instruction, we have already considered what constitutes actual notice; and as the other principles involved in this instruction are intimately connected with the fifth, we will state and examine them in connection. In the fifth instruction, the court charged "that the conveyance from Smith to Hopping before the service was recorded, only had the effect to pass the title of Smith to Hopping as between themselves and such other persons as had actual notice of said conveyance, and that such deed could not affect the rights of a subsequent purchaser at a sheriff's sale on an execution against Smith, without actual notice."

It will be seen by the facts which we have stated, that at the time judgment was rendered against Smith, Hopping was in possession of the land in question, and had previously obtained a deed for it from Smith, but had neglected to file his deed for record. It is urged, as worthy of consideration, that as Smith had conveyed the land to another, and as a consequence had no interest or ownership in it at the time judgment was rendered against him, such judgment could not operate as a lien upon the land.

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No one can think of controverting this position, if such grantee had acquired complete and absolute title to the premises. A conveyance is not complete, a title not absolute, until all the leading requirements of the law regulating conveyances have been substantially complied with. If there had been no registry law in force at the time the deed was given to Hopping, nor when the judgment was rendered against Smith, then the unrecorded deed executed and delivered in good faith anterior to the judgment, would have been evidence of title in Hopping even against the creditors of Smith. Had this been the case, the position assumed by counsel for him as plaintiff in error could not be overcome. But unfortunately for his title, there was a registry act in force, not only when the deed was given, but also at the date of the judgment. At the date of the deed, February 6, 1840, a statute of Michigan, entitled, "An act concerning deeds and conveyances, approved April 12, 1827," was in force. Michigan laws of 1833, p. 280; also republished in appendix to Wisconsin laws of 1836, p. 42. The first section of this act, in defining what shall constitute a good and sufficient deed to pass land, provides that it shall be signed and sealed by the parties granting the same, signed by two or more witnesses, acknowledged or proved, and recorded as in the act provided. The second section, after specifying the manner in which deeds shall be acknowledged or proved, requires that "such deed or conveyance shall be recorded in the office of register of probate for the county, or register for the city, where such lands, tenements, or hereditaments respectively are situated, lying, and being; and every such deed or conveyance that shall, at any time after the publication thereof, be made and executed, and which shall not be acknowledged, proved, and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the recording of the deed or conveyance under which such subsequent purchaser or mortgagee may claim." The

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stringent and imperative character of this statute needs no comment. It extends no relief, contains no saving clause in favor of an unrecorded deed, when brought in conflict with the rights of a subsequent purchaser, who has complied with the beneficial requirements of the registry law. Such unrecorded deed is to be unconditionally adjudged void against such subsequent purchaser, and cannot be aided by showing even actual notice. It must be obvious, then, that Hopping acquired no right, by his imperfect conveyance, against subsequent purchasers under the law of Michigan. This law continued operative until the first day of June, 1840, when an act of the Iowa legislature took effect. This was entitled, "An act to regulate conveyances," and was approved January 4, 1840. It does not in express terms repeal the Michigan law of 1827, but it displaces that law by its new regulations and provisions in relation to the same subjects—that is, the old law was suspended by the existence and effect of the new; but if any portion of it continued operative, it was soon after repealed by a general repealing statute. Laws of Extra Session of 1840, p. 20, § 1. The question may here be presented, Did Hopping, by virtue of his unrecorded deed, acquire any additional right under this change in the law? The 29th section of the new act (Laws of 1840, p. 39) requires every instrument in writing, conveying or in any way affecting real estate, when proved or acknowledged, and certified as required by the statute, to be recorded in the office of the recorder of the county in which such real estate is situated. The next section provides, that from the time of filing such instrument for record, it shall be notice to all persons; and § 31 declares, that "no such instrument in writing shall be valid except between the parties thereto, and such as have *actual* notice thereof, until the same shall be deposited with the recorder for record." As Hopping neglected to comply with the regulations of this law until after the judgment was rendered against Smith, and after Burnam's title was in all respects perfected by having his deed from the sheriff

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duly filed for record, we can deduce no other conclusion from the premises than that Hopping's deed from Smith is invalid as to Burnam, and can in no way impeach his title. It is true that this deed possesses ample validity between the immediate parties to it, without a compliance with these recording acts. These laws were not intended to affect the immediate parties to conveyances, but they were designed as a protection and shield to third persons, as an effectual barrier against fraud and imposition upon the rights of creditors, and innocent subsequent purchasers. And as such laws are found to be vastly conducive to this noble object, they are regarded with peculiar favor by courts of justice. They cannot be considered as oppressive or onerous. Their regulations are easily understood, they may be readily followed, and afford ample protection to all parties concerned. Men buying real estate in good faith, and for a valuable consideration, generally have the precaution to comply with the regulations of a law so beneficial in its effects, and so essential in securing title. If this prudential regulation is neglected, the delinquent purchaser has no one to blame but himself. The presumption of fraud is created against the validity of his purchase by his own laches, and he must abide the legal consequences.

Had the purchase been made and the deed delivered prior to the judgment against Smith, Hopping would have been secure by filing his deed for record previous to the rendition of the judgment. But as this essential attribute to title was omitted, Smith's right to the land, so far as it concerned his creditors or subsequent purchasers, was not alienated, but still remained in him for their benefit, as absolutely as if no transfer had been made, and hence his right was the proper subject of the lien created by the judgment. See act to prevent frauds, approved January 19, 1840, Rev. Stat., 271, § 4.

Another position assumed by counsel with apparent confidence is, that the instructions of the court below were erroneous, because, as they allege, the deed to Hopping

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was not subject to any recording act. In support of this point, it is contended that as the Iowa recording act of 1840 took effect after the deed was given, and as no law should have a retrospective operation, it should not affect Hopping's previously acquired title. We fully agree with counsel that a statute cannot operate retrospectively so as to impair rights previously acquired. But we are unable to see the particular application of this principle to the present inquiry. In sustaining the action of the court below, no retrospective construction of the statute is necessary, nor are vested rights in any way disturbed. We have already shown that Hopping acquired no right against the creditors of Smith nor against subsequent purchasers, previous to the law in question, and consequently he had no right which could be impaired by its provisions; neither did he acquire any right under this law, because he did not avail himself of its regulations. He was by no means exempt from its recording requirements merely because his deed was executed before the law took effect. Its provisions were not limited to deeds subsequently executed, but they extended equally to deeds then *in esse*, to those previously executed and acknowledged but not recorded. And still the law did not retroact, it did not require deeds to have been recorded before it took effect, but it assumed a regulation over them from and after that event. It operated in the same way upon prior deeds, as did the 6th section of the act to prevent frauds operate upon judgments previously rendered, and must be governed by the same rule of construction recognized by this court in *Woods v. Mains*, 1 G. Greene, 275. We can discover nothing in *Norris v. Slaughter*, 1 G. Greene, 338, which militates even remotely against our conclusion upon this point.

Hopping's common law rights under the deed are adverted to, but as the deed has never been without statutory control, never for a moment released from the requirements of a recording act, it is useless for us to consider what rights he might have acquired under a law which has had no bearing upon the case.

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Thus viewing the principal objections urged to the instruction of the court below, and the uncontroverted principles of law applicable to those instructions, we are led to the conclusion that they were properly given.

From the foregoing remarks it will be understood that this court still adheres to the principle decided in *Brown v. Tuthill*, 1 G. Greene, 189, that a judgment lien will hold against a prior unrecorded deed, without actual notice. We have carefully examined the arguments and authorities brought to bear adversely upon this decision, and we are unable to see any substantial reason for doubting its propriety or correctness. Indeed, we cannot see a reasonable or plausible ground for any other conclusion, unless legislative enactments upon the subject, and the right of parties under existing laws, should be entirely disregarded. In no other way can the intention and spirit of those statutes be maintained. Clearly common law decisions, or those made upon statutes materially different, cannot be applicable to the laws of Iowa. We believe in every state where laws like ours are in force, like decisions have been made.

In *Parker v. Miller*, 9 Ohio, 108, the title acquired by the purchaser under the attachment law of that state, was adjudged preferable to the title of an alienee of the judgment debtor by deed executed before, but not recorded till after the lien was created by the service of the writ. As the deed in this case was not recorded as required by the law of that state, it was determined that the rights of the first grantee, not having been legally perfected, should yield to those of the second.

In Pennsylvania it has been held that a purchaser of lands at a sheriff's sale is protected from all instruments not recorded and of which he had no notice. *Irvine v. Campbell*, 6 Binn., 118.

In Virginia it has been decided that when a deed of land is made by a debtor, before judgment is recovered against him, but not recorded until afterwards, the judgment is a lien on the land. *McClure v. Thistle*, 2 Gratt., 182.

And so in Missouri, a judgment lien will hold against a prior unrecorded deed, *Reed v. Austin*, 9 Mis., 722. A like decision was previously made by the same court in the case of *Waldo v. Russell*, 5 Mis., 377; also in *Hill v. Paul*, 8 *ib.*, 479. In the case last cited, a mortgage was given about one month before judgment was rendered against the mortgagee, but was not filed for record till over two months after. The sale under the judgment and the recording of the sheriff's deed took place at a still later period, and the purchaser was duly notified at the sale that there was a mortgage on the land, and still it was held that the judgment lien and sale under it were good against the mortgage. These cases are decided upon statutory regulations, which are in all particulars analogous to those of Iowa.

The same doctrine also obtains in Kentucky under a statute which declares such deeds void as to creditors and purchasers without notice. *Graham v. Samuels*, 1 Dana, 166; *Helm v. Logan*, 4 Bibb, 78.

We find in Massachusetts the same principle recognized. It was held in *Coffin v. Ray*, 1 Met., 212, that the creditors of a second grantee, who had proceeded by attachment against his land, would hold against the second grantee without actual notice of his prior unregistered deed, personally given before the attachment levy.

The same may be said of Illinois, *Martin v. Dryden*, 1 Gilman, 187. So in North Carolina, *Davidson v. Cowen*, 1 B. and Dev. Eq. Cas., 470.

In Tennessee, a deed not duly registered is void as to the creditors of the grantee, either with or without notice. *Washington v. Tronsdale*, Mart. & Yerg., 385.

We find in other states decisions to the same effect. But in New York a prior unrecorded mortgage was preferred to a subsequent judgment. *Jackson v. Dubois*, 4 John., 216. And this doctrine is mainly sustained by subsequent decisions. *Jackson v. Terry*, 13 John., 471; *Jackson v. Town*, 4 Cowen, 606; *Jackson v. Post*, 9 *ib.*, 120. In the first of these New York cases it is conceded

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by the opinion of the court, that if the purchaser had perfected his title under the judgment before the registry of the mortgage, he must have recovered. In *Jackson v. Terry*, the subsequent purchaser from the judgment debtor prevailed against the judgment purchaser, because his deed from the sheriff had not been recorded. The case of *Jackson v. Town* turned chiefly upon the want of title in the judgment debtor. And in *Jackson v. Post*, the purchaser under the judgment, appears to have had notice of the prior deed. These decisions are explained and qualified in *Jackson v. Chamberlain*, 8 Wendell, 621, and in *Jackson v. Post*, 15 *ib.*, 588. The registry act of New York, under which these decisions were made, is like the English statutes and applies to a subsequent *bona fide* purchaser without notice. This, it is considered, does not extend to a judgment creditor. But the statute of Iowa in force at the time judgment was rendered against Smith, is much more comprehensive. In unrestrained language, it declares that no unregistered deed shall be valid except between the parties and such as have actual notice. This as clearly comprises creditors without notice, as it does purchasers. Beyond the two exceptions, it is unqualified in its extent and application. Giving to our statute, then, the construction and effect evidently intended by the legislature, and directed by the enlightened adjudications of other courts upon similar statutes, we are united and clear in the opinion that the judgment against Smith, having been rendered without actual notice upon his creditor, became an effectual lien upon the land in question, and that it can in no way be impaired by the unregistered deed to Hopping.

A judgment lien, it is true, does not of itself establish a right to the land on which it attaches, but it does confer a priority interest, a right to levy on the same to the exclusion of subsequent and adverse claims, and when the lien is enforced by the judicial sale, the title of the creditor and of those claiming under him relates back to the date of the judgment, and prevails to the exclusion of all inter-

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mediate incumbrances. *Rankin v. Scott*, 12 Wheat., 177; *Conard v. Atlantic In. Co.*, 1 Peters, 442; *Massingell v. Downs*, 7 Howard U. S., 767.

Under this view of a judgment lien, it will be observed that Burnam's title, acquired under the judgment by virtue of the levy and sheriff's deed, must commence from the date of the judgment, and from that time be preferred to all subsequently acquired or registered rights. If then Burnam's title rested upon the priority of the judgment lien alone, without reference to the fact that his deed was first recorded, it would prevail over Hopping's unregistered deed. Burnam's priority of title appears to be based upon a double security. The preference to his title is not only secured by the judgment lien, but also by his prior recorded deed, which was filed for record five days before Hopping's. That the deed for land, first filed for record though subsequently dated, will have the preference, can not be controverted. Upon this point see, in addition to the authorities cited, *Thompson v. Bullock*, 1 Bay, 364; *Curtis v. Deering*, 3 Fair., 499; *Trull v. Bigelow*, 16 Mass., 406; *Whittemore v. Bean*, 6 N. Ham., 47; *Lightner v. Money*, 10 Watts, 407; *Jackson v. Walsh*, 14 John., 407.

In thus deciding this case, we have carefully examined the authorities adduced and the arguments adroitly applied by counsel for the plaintiff in error, and still we are unable to arrive at any other conclusion. The case of *Jackson v. Chamberlain*, 15 Wend., 620, upon which particular reliance appears to have been placed, is not we think departed from by our views in this case. The facts in the two cases are by no means analogous. In that case the unrecorded deed was executed in 1793, at which time there was no law in force requiring a deed to be recorded in order to give it validity, consequently the conveyance to the grantee was perfect on the delivery of the deed. As there was no want of validity in the transfer, the grantor's right to the property was completely divested, and of course a subsequent judgment against him could not create a lien upon the property. The opinion of the

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court shows conclusively that if there had been a registry act in force, as in the case at bar, a different decision would have been made. On page 624, the court say, in relation to the grantor of the land, that "even if the title had passed from him in a manner conclusive against him as in favor of his grantee, as by an unrecorded deed where the statutes require a record to conclude subsequent incumbrances on *bona fide* purchasers, still if such record be necessary as against such purchasers and incumbrancers, an unrecorded deed is unavailing against them; so in this case, had it been necessary by statute in 1793, that every deed should be recorded to give it effect against subsequent *bona fide* purchasers or incumbrancers, then there would have remained an interest in Edwards (the grantor) upon which the judgment would have been a lien, and though our statute does not save the rights of judgment creditors, and the judgment alone is unavailing as an incumbrance against an unrecorded deed, yet when that judgment is enforced, and a sale is made upon execution, and the sheriff's deed is first recorded, the purchaser becomes a *bona fide* purchaser, and in that character is entitled to the property in preference to the grantee of the unrecorded deed." Apply these views of the law, predicated upon the limited and peculiar statute of New York, and still they fully sustain the general conclusion to which we have arrived in this case. But as the statute of that state does not justify the same efficiency and force to judgment liens, the decisions of their courts upon those points cannot be applicable to Iowa. So far as they are applicable, we are disposed to regard them as reliable authority, and from which we think there has been no departure in adjudicating the questions involved in this case.*

Judgment affirmed.

M. D. Browning and J. C. Hall, for plaintiff in error.

Henry W. Starr, for defendant.

* A petition presented for a rehearing of this case was overruled.

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DE LOUIS *et al.* v. MEEK *et al.*

A bill to vacate a judgment of partition for fraud may be in the nature of a bill of review, and may be demurred to for want of equity.

No motion having been made to amend, a bill may be dismissed, and a decree rendered upon the demurrer.

Upon a general and special demurrer it is not necessary to make good all the causes of demurrer assigned. If sustained for one out of several causes affecting the whole bill, it is sufficient.

A demurrer puts in issue the entire equity of the bill, and if sustained as to some, it should be as to all the defendants.

The objection of a misjoinder of complainants cannot be made for the first time at the hearing, but should be assigned among the causes of demurrer.

An allegation of fraud in a bill to set aside a partition, is sufficiently specified where it charges that the attorney for plaintiffs in the partition suit entered the appearance of complainant without his knowledge, consent, or authority, and thereupon admitted a large amount of spurious, fraudulent and unjust claims to others, which proportionably diminished his share in the property.

Where a bill charges actual fraud on the ground of deception, artifice and circumvention, in terms judicially intelligible, it is sufficient.

Where a judgment in partition is alleged to have been obtained by fraud, it may be impeached by an original bill without leave of the court.

If the attorney of a party by fraudulent representations procure his opponent's defeat in court, or if an attorney appear and act for a party without his knowledge or authority, the party injured may be relieved in a court of equity on the ground of fraud.

The provisions of the partition act can only apply to proceedings within its legitimate power, and not to proceedings *mala fide*.

Fraud vitiates the most important judicial acts.

If in a compromise partition, the petitioners or their attorneys act fraudulently by misrepresentation or concealment, the party injured is entitled to relief in equity.

A general allegation of fraud in a bill is sufficient, if so certainly and distinctly stated as to make the subject matter of it clear.

APPEAL FROM LEE DISTRICT COURT.

Opinion by WILLIAMS, C. J. Elizabeth De Louis, formerly Elizabeth Hunt, John Wright, and Henry De Louis, husband of the said Elizabeth, on the 20th day of August, 1845, filed their bill of complaint against William Meek *et al.*, in the district court of Lee county, setting forth that by treaty between the United States of America and the

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Sac and Fox nation of Indians, dated August 4, 1824, a certain tract of land lying and being within said county of Lee, and commonly known as the "Half-breed Tract," and lying between the rivers Des Moines and the Mississippi, and bounded on the north by a line running due east from the north-west corner of the state of Missouri to the Mississippi river, as in said treaty set forth, was reserved for the use of the half-breeds belonging to the Sac and Fox nation, to be held by them as other Indian titles were held; that on the 30th of June, 1834, by an act of Congress, the reversionary interest of the United States was relinquished, and vested in such half-breeds as were by the Indian title entitled to the same, under the reservation in said treaty; that the tract of land contains about 119,000 acres, more or less; that Elizabeth De Louis is one of said half-breeds mentioned in the treaty, and in said act of Congress, to whom said reservation and relinquishment was made; that by virtue thereof she became the legal owner of one full undivided and equal share of said tract of land, in fee, in common with the other half-breeds designated and intended as the recipients of the said reservation and relinquishment of the land aforesaid; that she was married to Henry De Louis; that she, or her said husband, had never sold, or in any manner parted with, her or their interest in said land, but had since said treaty resided on the land, and had never in any manner abandoned the same or her interest therein; that she and her husband, at the time of the filing of the bill, were entitled to one equal share of the land; and that they then resided on, and occupied a part of the land, as their home, and had made improvements thereon.

The bill then sets forth that John Wright claims, and is, the owner in fee of one-fourth of a full share in the said land, so held by reserve and relinquishment as aforesaid, by purchase from one Isaac R. Campbell, and Wilson Overall, who had purchased the same from Françoise Hebert, a half-breed of the Sac and Fox nation, who was

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entitled thereto by virtue of the treaty and act of Congress aforesaid: that she, the said Françoise, had intermarried with one Charles Menar; that at the time of the relinquishment she had not abandoned her claim, and had her home on the land; that she and her said husband had conveyed their share in the land to the said Campbell and Overall, from whom said Wright had purchased the same for a valuable consideration. For all which, reference is made to the title-deeds, ready to be produced in court.

The claim and title of Wright, by proper deeds of conveyance from Hebert and wife to him, for one-fourth of a share in the land in common with the other owners, is set forth, with the averment that he had his home and resided on the land at the time of making his complaint, and for a long time before it, and that he was an occupant thereof, and had made valuable improvements on said half-breed tract. The complainants then proceed to state in their bill, that on or about the 14th day of April, 1840, Josiah Spalding, and others therein named, filed in the district court of Lee county their petition for a partition of said half-breed tract of land among themselves and certain other persons pretending and claiming to be the persons entitled thereto under the treaty, reservation and relinquishment aforesaid, or legally claiming under those who were originally so entitled; that very many of the persons so petitioning had no good and legal right or equitable title to any part of said tract of land. The bill admits that the claims or titles of thirty-three persons besides those of De Louis and Wright, the complainants, are correct and just, and avers that all the rest and residue of the claims which were adjudicated and allowed in the said decree of the district court, made upon the said petition for the partition of the said land, were illegal and fraudulent, being obtained in the names of persons who had no real existence, or by persons who had fraudulently represented themselves to be half-breeds when in truth they were not: and that the petitioners well knew that the said claims were unjust, and could not be substantiated by legal proof.

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The bill also charges, on behalf of Wright, that Reid & Johnston, solicitors of the district court of Lee county, entered his appearance for him, said Wright, in the suit for partition in which the decree was entered, and assumed to act for him without any legal authority so to do, and without his knowledge, and consented to the decree on the part of your orator without legal authority so to do, that they, said Reid & Johnston, were at the same time acting as solicitors for Marsh, Lee & Delavan, and others in the same proceeding; that they entered into said consent so as to procure a large portion of said spurious claims to be allowed in favor of said Marsh, Lee & Delavan, and others, so as to swell greatly their interests, and thereby proportionably to diminish that of said Wright; that all such claims to said land, so admitted and allowed, except the thirty-three shares and one-fourth of a share named in petitioners' bill of complaint, were fraudulent and unjust, never could have been substantiated by legal proof, and would never have been admitted into the decree except by the consent or compromise so made. It then avers that the actings and doings aforesaid are contrary to equity and good conscience, and that the petitioners were thereby greatly injured and defrauded.

It is also charged in the bill that the consent or compromise upon which the decree was entered, was made by the parties thereto and the conductors thereof in fraudulent confederation and collusion with each other, they having combined to cheat and defraud petitioners in the premises, and that the complainants did not participate therein; that the same was intended to, and did, injure the rights and possessions of the petitioners, and injuriously affect and endanger them in the quiet enjoyment of their improvements and homes on the said half-breed tract of land.

The bill further charges that the decree was produced and obtained by falsely and fraudulently inducing the court which made it to believe that all legal claimants interested in the said tract of land were duly and legally

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represented in said court, and that their rights were equitably secured thereby; that they, or persons legally authorized to act for them in the premises, had mutually agreed and consented thereto, and had agreed on their respective interests in the land as therein adjusted, all of which was untrue in point of fact; that by such fraudulent collusion the court was deceived, and induced to order, adjudge and decree, and did order and decree, that the claims and rights of the said half-breed claimants amounted to one hundred and one in number, as equal portions or shares; and that the said one hundred and one shares should be divided amongst certain persons, parties to said decree, who are made parties to this bill as defendants, in the proportions specified in said decree, and that the rights, titles and claims of all other persons should thereafter be barred and concluded as to the land; that these doings are against and in derogation of the rights of the petitioners, and contrary to equity and good conscience.

It is then stated in the bill that commissioners were appointed to make partition of the land into one hundred and one shares of equal value among the parties to the proceeding for the decree. Reference is made to the proceedings in partition, making them part of the bill.

John Wright also complains that he appeared at the place of holding of the said court at the term when the decree was made, and before the making of it, for the purpose of proving up his claim, and to obtain his just rights; and that he was informed by one of the counsel for the complainants in said petition for partition, that the cause would not be tried at that term. He avers that this was done before any agreement in the case was made, or any action had upon said petition for the perfecting or making of said final decree; that under this assurance from said counsel he left the court, and returned to his home, under the belief that no such trial would be had at that term; that the information so received from said counsel was untrue and fraudulent in point of fact, and that by means of which he, the said Wright, was fraudu-

lently induced to believe that his being longer present at that term of the court was unnecessary; that he was thereby induced to leave and go home, and therefore failed to be present and attend, as he otherwise would have done, to the procurement of his just and equitable rights, by reason of which said Wright alleges that he was greatly cheated and defrauded, and suffered damage.

The bill then sets forth the names of the persons who received by said decree beneficial interests, among whom are Marsh, Lee & Delavan, trustees of the New York Land Company, and Isaac Galland and others. The bill charges, in conclusion, that the decree was obtained by collusion and fraud generally, and that it ought to be vacated, set aside and made void, and that the land in said tract ought to be partitioned anew among the rightful owners thereof.

The prayer of the bill is for the proper legal process to compel the parties respondent to appear and answer; that they be made to discover by what right they claim to hold any interest or claim in the land; that they may be put on the proof of their claims before the same may be allowed; that all and singular the facts of the case, and rights of the respective parties and true claimants, be made to appear, that full justice and equity may be done in the premises, in order that a full and ample relief in the premises, both general and special, may be granted and decreed, as equity and good conscience and the nature of the case shall require; and especially that the decree aforesaid be vacated and annulled for the fraud aforesaid, and that a re-partition of said lands may be had among the rightful owners thereof, according to their respective shares and interests therein; and that full and complete justice may be done in the premises to all parties concerned, according to the rules and principles of a court of equity.

The foregoing is the substance of the bill of the complainants in this action. To this bill the respondents demurred generally and specially, on the ground that it did not show equity on its face. Several special causes of demurrer were assigned, as follows:

1. The bill is defective in form and substance, and contains no equity entitling complainants to relief in chancery. "The bill charges fraud generally, but does not set out such facts as warrant the charge of fraud, either as to complainant Wright being deceived, or as to Reid & Johnston representing complainants and defendants. Nor, as to the compromise, that the parties knew bad claims were allowed, nor that the court was deceived and the decree obtained by fraud."

2. "The bill is defective and insufficient, as it does not specify any error apparent on the face of the decree or record, but only alleges imposition on the court, by which the court decreed erroneously with reference to the real justice of the case, but right according to the record, which is not allowable in a bill of review."

3. Said bill, although filed as a bill of review, contains matter that, if otherwise sufficient, is only proper for a bill impeaching the decree for fraud, which is not allowed.

4. The matter alleged in the bill charging fraud, and which is the only pretended equity in said bill, cannot be urged in such a bill (impeaching the decree for its fraudulent obtension) by complainants, who were parties to the decree.

5. Said bill is defective, because it does not definitely show what is its character; whether a bill of review, or a bill impeaching the decree for fraud in its obtension.

6. Said bill does not sufficiently set out the errors, if any, in said decree, by showing the proceedings void, and the particular error in the decree, as required by the rules of chancery pleading.

The demurrer was sustained by the court below, and is now here on appeal. As the counsel concerned for the parties have taken the complaint in this case, as filed, to be a bill in chancery in the nature of a bill of review, impeaching the decree in partition for fraud, and have so treated it upon the argument; and as this court is of the opinion that this is the proper character of the bill, it will

be so considered. This, then, being the character of the bill, we will proceed to examine the case, as presented on the demurrer of the respondents filed thereto.

The demurrer is general, and denies that the bill of the complainants contains any equity upon which to maintain their suit in a court of chancery for relief.

That the defendants had a right to demur to the bill for want of equity, we think cannot be with propriety questioned. It was their privilege in a proceeding such as this, to resist in the outset of the trial, by putting in question the legal right of the complainants to obtain a decree in accordance with their prayer upon their own showing in the bill, and thus put to the test of law the case as stated. It is the peculiar province of a court of equity to entertain, investigate and decide, questions of conscience, affecting the rights of the citizen, upon the pure and full principles of justice. But, in this court, the party complaining and seeking redress must come to her altar with pure hands, in good faith, and prepared to show that he is chargeable with no fault or gross negligence on his part. He must bring himself within the well defined limits of the judicial sphere, as prescribed by the rules of practice, in compliance with which alone justice can be properly invoked. He must show that he is injured in his rights by those of whom he complains; that he has a right to complain; that the wrong of which he complains is not his own; and that he has not an adequate remedy in a court of law. Failing thus to assume the proper position, it is the legal privilege of the respondent to demur, and put his complaint to the test of law. The privilege of demurring to a bill such as this cannot be questioned. See Story's Eq. Pl., §§ 637, 639.

Objection to the action of the court below has been made by the counsel of the complainants, in entering judgment against them upon the demurrer. It is urged that they should have been allowed to amend. The demurrer being sustained on the ground that the bill contained no equity, and as no motion was made for leave to amend before

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judgment was entered, there is no error in this. Story's Eq. Pl., § 361; Rev. Stat., p. 108. §§ 16, 17.

It is also contended by the complainants, that the particular causes of demurrer should have been distinctly pointed out by the party demurring. This would be correct, if the demurrer were strictly special in its nature. The demurrer, with the causes assigned, attacked the bill in a twofold character, with a view to defeat it in either. It does not bear the badge of a mere bill of review, and therefore the special causes assigned to assail it in that shape need not be considered; but, taking it as a bill in the nature of a bill of review, impeaching the decree for fraud, its equity is directly denied by some of the causes assigned. The assignments go to the entire gravamen of the complaint, so as to defeat it entirely on matter of substance; therefore the fact that the respondents failed to make the other special causes of demurrer good did not deprive them of the benefit of those which were valid in the court below. Story's Eq. Pl., 350, § 443.

It is alleged, also, that a part of the defendants only have demurred, and that, as to the rest, the bill should not have been dismissed. We have just stated that the demurrer strikes at the bill as entirety, putting in issue its whole substance, on the charge of fraud, against all the defendants. Upon this issue in law the right of action as to one and all of the parties was at stake. The bill seeks to set aside the decree in partition for fraud in obtaining it. If the decree be set aside as to one of the defendants, it will be so as to all. This rule in legal proceeding is in consistency with the dictates of sound reason and justice. 1 Scam., 553; *Vanschaik v. Trotter*, 6 Cowen, 600. Sufficient, however, has been said on this point, as upon the argument it was not strenuously urged. Whilst considering the points touching the demurrer, and the bill as affected by it, together with the action of the court upon it, it may be proper here to dispose of a question raised by counsel for the defendants. It is urged by them that the bill shows a misjoinder of the complainants, and is

therefore bad. If this objection to the bill be well founded, it should have appeared among the causes of demurrer assigned, so that the case might, in accordance with the rules of practice, have been disencumbered, by the dismissal of an improper party. On this point, see *Boyd v. Hoyt*, 5 Paige, 65; *Trustees of Watertown v. Conan*, 4 Paige, 510. In the case of *Grimes v. Wilson*, 4 Blackf., 335, this matter is discussed, and the true principle presented. There the parties stood in no privity with each other; one was an infant, and had a good case in equity; the other had a distinct cause of action clearly cognizable at common law, showing no impediment to his remedy there. There was no privity existing between them; their interests were separate; their demands independent. In such a case the bill would be dismissed in answer to the proper pleading. In the case at bar, although in the proceedings in partition, as set forth in the bill, the condition of the complainants is shown to be, in some respects, different, their interests in the end sought, by impeaching the judgment or decree of partition, is one and the same. The rights claimed by all the complainants are conjoined by the issue to be tried on the merits of the bill. The doctrine here asserted and adopted by this court is found in the case of *Ballantine v. Beall*, 3 Scam., 206, and Story's Eq. Pl., 530 and note, 531, 532, 535; *Tarrick v. Smith*, 5 Paige, 560; *Brinkerhoff v. Brown*, 6 John. Ch., 150. We deem it unnecessary to refer to further authorities on this point, as we think the principle and practice on it well established. Where there is unity in interest, as to the object to be attained by the bill, as in this case, the parties seeking redress in chancery may join in the same complaint and maintain their action together. In such a case, it is within the province of a court of chancery to mete out to each and all of the complainants their rights, on the principle of sound equity.

The objections presented touching the demurrer being disposed of, we will proceed to consider the bill under its legal operation. We have already said that the entire

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equity of the bill is put in question by the demurrer. Have the complainants presented such a case by their bill as will justify a court of chancery in granting the relief sought?

The complainants, De Louis and wife, show, on their part, that they are the owners in fee of one full share of the tract of land known as the half-breed tract, situated in Lee county, Iowa, to which Elizabeth, the wife of said De Louis, became entitled, as one of the original half-breed proprietors thereof, by treaty between the United States and the Sac and Fox Indians, made August 4, 1824, and by the act of Congress of June 30, 1834; that the tract contains about 119,000 acres of land, more or less; that she held the same in common with others claiming by the same title; that the said De Louis and wife are legally entitled to the same, &c. John Wright claims by title derived from the same source, by regular conveyance, and shows that he as owner is entitled to one-fourth of a full share of the said tract; that he lives on the land, has made valuable improvements, &c. By this showing the complainants put themselves in the condition of persons claiming and having rights of valuable consideration, involved with those of others in such proceeding at law, as may have been resorted to for the adjustment of the interests of the several owners of the land in question.

They then complain that by the agreement and consent of Marsh, Lee & Delavan, and others, and their counsel participant therein, they have been injured in and deprived of their just rights; and therefore seek relief, by praying that the judgment in partition of said land, entered by the district court of Lee county on the 6th of May, 1842, may be set aside for fraud.

We will proceed to examine the points made as to the merits of the bill on the ground of fraud. Although the bill has been dismissed as to De Louis and wife on their own motion, having been parties, we must consider it as it was in the court below. In the first place, it is contended

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that the charge of fraud, as laid in the bill, is insufficient in law ; that the charge is general, and does not allege the fraud in proper specifications as to the particular facts in which it consists. Judge Story, in his *Equity Jurisprudence*, vol. 1, p. 196. § 186, says : “ It is not easy to give a definition of fraud in the extensive signification in which that term is used in courts of equity, and it has been said that these courts, very wisely, never laid down as a general proposition what shall constitute fraud, or any general rule beyond which they will not go, upon the ground of fraud, lest other means of avoiding the equity of the courts should be found out. That fraud is more odious than force.” He then proceeds, on page 197, in the next section, to give a definition in substance, by saying that, “ Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions and concealments, which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

Applying this view of fraud in the court of equity, how does this case stand upon the bill? It contains, in the first place, a specific charge that the attorney for the petitioners for partition, without the knowledge, consent or authority of John Wright, the complainant, entered their appearance for him, acting at the same time for the petitioners, and entered into a consent and agreement to allow a large number of false and spurious claims in favor of Marsh, Lee & Delavan, and others, so as greatly to swell their interest, and thereby proportionably to diminish his. It then proceeds to aver that all the claims so allowed, except the thirty-three shares and one-fourth of a share, as enumerated in the bill, and set forth, are fraudulent and unjust, could never have been substantiated by legal proof, and would never have been admitted into said decree, except by such compromise ; that the actings and doings of the parties, conductors and others, concerned in making the compromise, are contrary to equity and good con-

science; and that by reason thereof, the complainants have been, and are greatly injured and defrauded in the premises. The charge of fraudulent confederation and collusion in making the compromise is clearly made against the parties thereto and the conductors thereof, they having so combined to cheat and defraud the complainants in the premises, and thus to deprive them of their just right; and to endanger and disturb them in the quiet enjoyment of their possessions and improvements on the tract of land aforesaid. The bill also charges that fraud and deceit were practised upon the court by inducing it to believe that the compromise was brought about by mutual consent of the rightful owners of the land, and proper parties to the proceeding, or those duly authorized to act in their behalf; that, in fact, all this was untrue.

That persons interested in land, as owners, being tenants in common, may by consent and agreement among themselves, *bona fide* make a division thereof so as to sever their interests, and thereupon, waiving the ordeal of trial by proof in court as to title, procure a deed of partition, is not doubted. In doing this, however, if there be owners whose interests are involved, who are not personally present, and do not participate in such consent, or who are not represented legally in the transaction, and whose interests or just rights may be injuriously affected or lost thereby, such persons may seek and find redress in a court of equity. If, in the procurement of such decree or judgment, fraud be resorted to by the parties obtaining it, then upon a proper case being made out by those who may have been injured by it, a court of equity will, in the exercise of its power, give relief.

It is admitted that the bill charges fraud in *general* terms. Then, if it contains any allegations of fact upon which the equitable interposition of this court is invoked, what are they? Do they show that the defendants used cunning, deception or artifice to circumvent, cheat or deceive the complainants? And do they charge defendants with positive or actual fraud in the fact? or that they

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are justly chargeable with acts, omissions and concealments, which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and by which the complainants are injured? The fact that the decree was not obtained in the ordinary mode of trial, as to proof of the rights of complainants to the land, but by consent, is clearly stated. Also, that very many of the persons who petitioned for a decree, and who participated in the consent or compromise upon which the decree was made and entered, and who were benefited thereby, had no good or legal right, or equitable title, to any part of the tract of land which was divided among them; that about two-thirds of the claims admitted and allowed were spurious, fraudulent, unjust and illegal; and being so, were taken into the decree so as to swell the interest of Marsh, Lee & Delavan, and diminish the interests of the complainants in the land, are fully charged. The bill here, we think, not only charges, specifically, facts which amount to omissions and concealments in making the compromise or consent, involving a breach of equitable duty, but that petitioners knew such claims of Marsh, Lee & Delavan, and others, were fraudulent, false and spurious, and that they fraudulently confederated and colluded with each other, with the intent to defraud and cheat the complainants. In this the bill goes further than to charge mere constructive fraud; and in terms judicially intelligible, charges actual fraud on the defendants, on the ground of deception, artifice and circumvention.

But it is urged that the proceeding was regularly in court, in accordance with the provisions of the law of the state; that the complainants had legal notice, and that it was their duty to attend to their rights and interests in the land. We consider that the bill furnishes a fair and full answer to this position, so far as Wright is concerned. He charges that, at the term of the court when the decree was made upon the compromise, and before either was **made**, he was in attendance for the purpose of seeing to his rights, and that he was told by one of the counsel of

the petitioners that the cause would not be tried at that term; that under this assurance of the counsel he left the court and went home. He also charges that by this act of the counsel he was fraudulently and deceitfully induced to believe that his presence was no longer necessary at that term of the court, and therefore he failed to attend to his rights. This act of the counsel is laid in the bill as having operated to defraud him. An attorney or counsel, when acting in court procedure for his client, acts in his stead. His acts, in managing the business in court, are the acts of the client. It will not be doubted that, if the party to a proceeding in court would, by fraudulent representation, procure his opponent's defeat in the like manner as stated in the bill in this case, the party injured might be relieved in a court of equity on the ground of fraud. Then, in the case of an attorney when acting for his client, the same principle of equity and good conscience clearly applies. If it did not, much confusion and injustice might be found to exist. We think the fact, as stated in the bill, that Wright was induced to leave court, taken in connection with the fact, which is also alleged as a ground of fraud, that the attorneys of Marsh, Lee & Delavan, and other petitioners, appeared and acted for Wright, the complainant, without his authority or knowledge, presents a clear exception to the general rule, and was sufficient to meet and overcome the demurrer.

It may be said that the fact that the attorneys having appeared for Wright without authority ought not to affect the petitioners for partition, and the others benefited by the compromise and decree. But they were the attorneys of Marsh, Lee & Delavan, and others, who were seeking to be benefited by the decree at the same time. The attorneys, according to the averments of the bill, must have known that they had no authority to appear for Wright in making the compromise. When the rights of parties are involved in legal action, such knowledge of the attorney is, in the general, considered as notice to the client. But clearly, if the attorneys knew that Wright

had given them no authority to appear and consent to the compromise for him, and they failed to inform the parties to it of that fact, it was a breach of duty and against good conscience. Story's Eq. Com., 395, § 408; *Astor v. Wells*, 4 Wheat., 466, 4 Condensed, 513; *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige, 137.

But, supposing that the attorneys who appeared for Wright had been authorized by him to act as his attorneys in the case, will it be contended that an attorney may, by consent and compromise, in a case of partition involving rights and interests to a vast amount, admit a large number of unjust, illegal and spurious claims, to the prejudice and manifest injury of his client, without his knowledge, consent and authority? It is true that courts of equity will be disinclined to disturb a consent or compromise made by an attorney who is authorized to appear for a party to a suit, unless it will operate unreasonably to the prejudice of the interests of that party; still, where it works great injustice, equity will give relief from it. In the case of *Holker v. Parker*, 7 Cranch, 436, the court decided that "although an attorney at law has no right to make a compromise, yet a court will be disinclined to disturb one which was not so unreasonable in itself as not to be exclaimed against by all, and to create an impression that the judgment of the attorney had been imposed upon or not fairly exercised. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise being unauthorized, and being therefore void, ought not to bind the injured party. Though it may assume the form of an award or a judgment at law, the injured party ought to be relieved against it." This decision speaks the language of sound equity, and, with a proper reference to the relation existing between an attorney and his client, limits the profession to its sphere of representative action, leaving the party represented professionally the indisputable

right of disposing of his own property according to his will.

In contemplation of equity, it is not allowable for attorneys or agents making contracts or agreement, with or without authority, to act in the making of them *mala fide*, so as injuriously to affect others who stand in such a relation to them as to be affected by the contract or the consequences; as others besides the parties contracting are concerned, it is properly said to be governed by public utility. Story's Eq. Jur., 326, § 133.

This principle is fully recognized by the supreme court of Illinois, and is brought within the corrective power of equity jurisdiction. In the case of *Truett v. Wainwright et al.*, 4 Gilman, 420, the court say: "The setting aside of judgments, as well in the case where they were procured by the misconduct of the plaintiffs, as where they were obtained by the unauthorized appearance of strangers, rests at last on the ground of fraud. The law looks upon such practices, however far the parties may have been from the thought of actually committing a wrong, as fraudulent, and treats them as such." To prevent injustice of this kind is, in the same case, said to be one of the most efficient, and therefore most valuable, powers of a court of equity.

The principle that an attorney cannot receive anything but money in satisfaction of a demand put into his hands for collection, without authority to do so from his client, has been decided by the supreme court of this state in the case of *McCarver v. Neally*, 1 G. Greene, 360. In *Hopkins v. Mallard*, *ib.*, 117, it has been decided that an attorney, after the decision of a case in the district court, without authority from his client, is not warranted to follow the case, as such, into the supreme court and attend to it there, when the contract was to attend to it in the district court alone.

The books are not destitute of cases and decisions emanating from the best lights of equity jurisprudence, clearly and distinctly showing that attorneys cannot,

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without the consent and authority of their clients, make contracts or compromises which will operate injuriously upon their interests; that such acts do not appertain to their professional duty and responsibility. Courts of equity have, when a case is properly presented, entertained jurisdiction and given relief for wrongs of this description on the ground of fraud, and will still do so.

It is contended by the defendants that leave should have been obtained from the court below to file this bill, and that it therefore should not have been entertained. Where a decree or judgment in partition, such as the one complained of here, is alleged to have been obtained *by fraud*, it may be impeached by an original bill without the leave of the court, the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be questioned. Mitford's Ch. Pl., p. 138. And where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be. *Idem*, p. 130. And on the same page, express and pointed authority is given for the entertainment of the bill in this case. Mr. Mitford says: "When a decree has been made by consent, and that consent has been fraudulently obtained, the party grieved can only be relieved by an original bill." That the remedy in such case is by an original bill, cannot with propriety be questioned, and such is the mode for relief where judgments at law are obtained by fraud. *Fermor's case*, 2 Coke, p. 77; *Anderson v. Anderson*, 8 Ohio, 108; 2 Vesey, 135; 3 John. Ch., 280; 2 Blackf., 271; *Porter v. Moffatt*, Morris, 108.

It is contended that the remedy of the complainants is against the attorneys, if they have appeared without authority or acted improperly, so as to injure them in making the compromise and procuring the decree. Such, however, is not the law where their conduct is charged to be **fraudulent**. If their conduct in procuring the compromise and **entry** of the decree or judgment thereon be **fraudulent**, the party or client is not bound by it, for it is void

in law, particularly if the acts so performed were done in fraudulent confederation and collusion with others who stood in a relation to the proceeding to be benefited thereby. *Sloo v. Bank of Illinois*, 1 Scam., 444, and note; *Denton v. Noys*, 16 John. Ch., 296.

But it is urged, with much apparent confidence, that the complainants here, and particularly Wright, are not in a condition to claim relief, for the reason that they have been benefited by the compromise and decree, instead of being injured. This position is presented on the view, that all that has been charged in the bill be true and sufficient, in point of fact and law, to show that fraudulent claims were allowed, as stated in the bill; and that the attorneys who acted for Wright in making the compromise did so without his knowledge and authority.

The bill states that the "half-breed tract" contained 119,000 acres of land, more or less; that there are but thirty-three or four *bona fide* claims, or original titles to shares of "half-breeds" thereto, under the treaty and act of Congress; and that by the compromise or consent decree, the claims are made to amount to one hundred and one, by the admission of spurious or fraudulent titles. Taking the allegations of the bill to be true, it is clear that the complainants must be injured by diminishing their interests in the land, by the increase of the number of claims or shares. The statement in the bill will make a difference in the amount and value of the interest of the complainants, in diminution of about two-thirds of their rights. We are of the opinion that the allegations of facts in the bill do not show that the complainants were benefited, but that they have been injured substantially and materially.

In this view of the case, it is urged that the complainant Wright, having failed to appear in person to take part in the making of the compromise, would have been barred from receiving any portion of the land; whereas, by the appearance and acts of the attorneys for him in the transaction, he was made a participant with others who were

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admitted to the benefits of the compromise and decree. To sustain this position the statute of Iowa, which provides for the partition of lands, is referred to. The 36th section of that statute is cited, which provides that "where all the parties in interest shall have been notified to appear and answer the petition, either by the service of the summons, or by the publication hereinbefore prescribed, the judgment aforesaid shall be binding and conclusive upon all persons whatsoever."

We think it all-sufficient on this point to say, that this statute must be held to apply to all proceedings which may have been had, with its legitimate force and effect, where such proceedings are had *bona fide*; but it never was intended to cover up proceedings *mala fide*. Such a construction of it would be at variance with the plainest principles of law and justice. The purifying power of equity jurisprudence will not thus be stayed. To impute to the legislature a design to sanction fraud by solemn enactment, would reflect upon their integrity. Fraud vitiates the most important judicial acts when found to exist in them, and renders them void upon discovery before the proper tribunal.

If Wright had been personally present, or if he had, like De Louis, been represented in making the compromise, still if the petitioners, or their attorneys, had acted fraudulently, either by misrepresentation or concealment, so as to deceive and injure them in their rights, they would be entitled to relief in a court of equity.

The negligence of Wright is also urged as a reason why he has no equitable claim to relief. There can be no doubt that this would operate against his right to the equitable interposition, if he sought to be relieved from the effect of mere irregularity in the proceedings of the court in making the partition, and when he had failed to be vigilant in asserting his rights. But in this case the bill charges *fraud* upon the petitioners and attorneys, in making the compromise, and in procuring the decree to be entered and confirmed, by practising deception upon the court.

We have not been able to find any authority for requiring a party to be on his guard against fraudulent acts, by combination or otherwise, and on failure to prevent which, he will be held as negligent and in default. The spirit of the law moves in a pure channel, imparting life and vigor to justice in disposing of the rights of the citizen. A suitor in court, or one whose interests are at stake there, has an indisputable right to legal protection, and to be dealt with in all fairness. He will be held to suffer the legitimate effects of his own negligence, but no more. Such is the subtlety of fraud, its infinitude of character and shape, and its power of insinuation, when conceived and brought to life and action, that the most sacred and best guarded citadels of right and justice among men are not always safe from its invasion. Wright could not be presumed to prevent the fraud by his personal presence and attention, and the law does not recognize this answer to his complaint as good. The bill avers that he and De Louis and wife, the complainants, were not in any way participant in the transaction upon which the fraud is charged. This we deem sufficient on this point.

In a bill of this kind it cannot be successfully contended that more is required than to state every material fact upon which the complainants intend to offer evidence, distinctly and clearly. A general and substantial charge of such a fact is sufficient. It is not necessary to charge minutely all the circumstances which may conduce to prove the general charge; these circumstances are for the matter of evidence, which need not be charged in order to let them in as proofs. Story's Eq. Pl., p. 24, § 28; *Whelan v. Whelan*, 3 Cowen, 571. In 6 Howard, 120, *Davis v. Teleston et al.*, Judge Woodbury, in delivering the opinion of the court, says: "The existence of fraud in obtaining the original judgment, which is the other ground assigned for relief, is next to be considered. It is not only alleged generally, but in details, so far as already specified in this opinion; a general allegation of it in the bill would have been sufficient, if so certain as to render the subject matter

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of it clear." In support of this position he cites the cases of *Nesmith et al. v. Calvert*, 1 Woodbe & Minet, 44; *Smith v. Burnham*, 2 Sumner, 612; *Jenkins v. Eldridge*, 3 Story, 181.

In the case at bar the substantive facts upon which fraud is charged are so stated as, with certainty, to render the subject matter of the bill clear as to the allegations therein made. We therefore are of the opinion that the court below should have overruled the demurrer of the defendants and put them upon their answer to the bill upon its merits.

In concluding our decision upon this interesting case, we have only to add, that we have given it a most patient and careful investigation, commensurate, we trust, with its importance. We have paused, reflected maturely, and would willingly have avoided a decision which may possibly disturb titles which have become vested under the decree of partition, and open the door for future litigation. Sensible that consequences, weighty in their character, may emanate from a decision which will put in issue the facts charged in the bill, still it is no less the duty of this court to decide the questions of law presented in the elaborate arguments according to the principles of equity jurisprudence. Guided in our determination by the brightest judicial lights of the country, we have endeavored to reflect the law as we find it in the books. This we consider a duty for which there is no alternative, and paramount to consequences however to be deplored. Avoiding any intimation in relation to the merits of the case, we are of the opinion that the bill shows sufficient equity on its face to put the defendants on answer. The cause will therefore be remanded to the district court of Lee county for further proceedings to be had not inconsistent with this opinion.

Decree reversed.

J. C. Hall and D. Rorer, for appellants.

C. Mason and C. Walker, for appellee.

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As a general rule, courts of law and of chancery have concurrent jurisdiction in matters of fraud. Still in many cases chancery will afford relief against fraud which cannot be remedied at law.

At law fraud must be proved; in equity it may be presumed.

A patent for land from the United States, cannot generally be impeached at law for fraud.

If fraud appears upon the face of a patent, it is rendered void at law; but when fraud or other defect arises *dehors* the grant, it is voidable only by suit in chancery.

A pre-emption certificate not evidence of legal title.

If a patent is void upon its face, or was issued without authority, or if the state had no title, it may be collaterally impeached at law; but for the determination of all other defects, resort should be had to a court of equity.

ERROR TO DES MOINES DISTRICT COURT.

Opinion by KINNEY, J. This was an action of right, brought by Grimes against Arnold, to recover the north-east quarter of section 36 in township 70, north of range 3 west.

A bill of exceptions was taken on the trial by Arnold, from which it appears that Grimes gave in evidence a patent from the United States, dated in 1836, to W. W. Chapman for the land described in the declaration, and also a deed from Chapman to him; this, with proof of Arnold's possession, constituted the testimony on the part of the defendant in error.

Arnold then in defence offered the record of a petition in chancery, with a decree of the district court of Des Moines county, and a decree of affirmance by the supreme court of Iowa, in a case in which Arnold was the complainant and said Chapman and Grimes were defendants. This evidence was not admitted. In order to a proper understanding of the character, bearing and relevancy of the evidence proposed, it becomes necessary to examine the petition and decrees, in which Arnold sought to defeat the fee simple title established in Grimes by patent to

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Chapman, and by deed from Chapman to him. It seems that Arnold, on the 15th day of November, 1841, filed his bill in the district court of Des Moines county, making Chapman defendant, setting out, among other things, that he settled upon the land (now in controversy) in 1835. That he occupied it until 1839, when he applied to the proper land officers for a pre-emption under the act of Congress, approved June 22, 1838, entitled "An act to grant pre-emption rights to settlers on the public lands." That Chapman was present at the time an examination was made into his right to a pre-emption, and cross-examined the witnesses. That after a hearing of the whole testimony, the land officers decided that Arnold was entitled to a pre-emption, and accordingly issued to him a receiver's receipt upon his paying the purchase money. From this decision, the land officers awarding the pre-emption to Arnold, Chapman appealed to the commissioner of the general land office. The complainant Arnold then sets out that during the summer and fall of 1839, after the appeal of Chapman, that Chapman made alarming and repeated threats, that unless complainant would convey to him a portion of the land so pre-empted by complainant, that he, Chapman, would take complainant's life, and that, under fear and duress, &c., complainant and Chapman arranged their difficulties by Arnold's conveying to Chapman twenty-seven acres of the land, and Chapman conveying to Arnold forty acres of other land. The bill charges, in the most emphatic manner, that this conveyance was extorted from Arnold, the complainant, by Chapman, by reason of duress, fraud and fear of personal violence. The bill then sets out, that complainant again in the summer of 1840 applied for a pre-emption to the same tract of land under the act of Congress, approved June, 1840, entitled "An act supplemental to an act entitled an act to grant pre-emption rights to settlers on the public lands, approved June 22, 1838." That Chapman was notified of his intention to make the application, and that on the 10th of October, 1840, the land officers proceeded to hear the testimony, and decided

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that complainant was entitled to a pre-emption upon the said tract of land. A receiver's receipt of that date was accordingly issued to him, Chapman not being present. It is then charged in the bill, that Chapman afterwards notified the commissioner of the general land office that he protested against Arnold's pre-emption, and that to set it aside he forwarded to the secretary of the treasury of the United States the deed from Arnold to Chapman for a part of the same land, as conflicting with the oath taken by complainant. That the secretary of the treasury set aside this last entry of Arnold's and retained the two hundred dollars paid as purchase money.

The bill, after reciting and charging various acts of fraud and duress on the part of Chapman, in procuring the deed to a portion of said land for the *purpose of using* it to defeat the complainant in his pre-emption right, prays for a cancellation of the deed from Arnold to Chapman, upon the ground of such duress and fraud.

Grimes having been made party, the cause was tried upon the original and supplemental bill, exhibits, answer and evidence, whereupon the court found the bill and exhibits true, and decreed a cancellation of the deed from Arnold to Chapman, conveying the twenty-seven acres mentioned in the bill of Arnold, and that said Chapman or said Grimes, if in his possession, should deliver up said deed to be cancelled. This decree was affirmed by the supreme court as set out in the bill of exceptions.

The defendant below, Arnold, also offered to prove, in connection with said record, that the deed referred to in said record, and cancelled by said decree, was the deed used by Chapman to set aside his pre-emption and entry of said land, and that aside from that deed so set aside by the decree, Arnold's entry was in all respects regular. Defendant also gave in evidence the original certificate of his pre-emption purchase as set forth in the record. The **plaintiff** below objected to said record being admitted to the jury, and the court sustained the objection, and ruled that the record and parole evidence should not be given to

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the jury. To the ruling of the court excluding this evidence the defendant excepted, and assigns the same for error.

It was urged in the argument of this cause by the counsel for the plaintiff in error: *First*, That courts of law and chancery have concurrent jurisdiction in all cases of fraud; and, *Second*, That the evidence was admissible to show fraud on the part of Chapman in procuring the patent. As a general rule the first proposition is correct, although the books are not barren with exceptions to this proposition in its broadest signification. While courts of law may have jurisdiction in cases of fraud, it not unfrequently happens, from the very circumstances and nature of the case, that such courts cannot exercise their jurisdiction to relieve against it.

Fraud in a court of equity properly includes all acts, omissions and concealments which involve a breach either of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. *Belcher v. Belcher*, 10 Terger, 121. "Courts of common law cannot supply defects of will, or rectify mistakes in written agreements or conveyances. If the end proposed is lawful, a court of common law only inquires what acts of will were really exerted, and the deed or covenant is made effectual without regard to consequences. But courts of equity are more at liberty to follow the dictates of refined justice. They consider every deed in its true light as a means employed to bring about some event, and in this light they refuse to give it force any further than is conducive to bring about the proposed end. When from any defect of the common law, want of foresight of any of the parties, or other mistake or accident, there would be a failure of justice, it is the duty of a court of equity to interfere and supply the defect or furnish the remedy." 2 Paige, 84. But so far as courts of common law can exercise their jurisdiction in cases of fraud, it may be said to be concurrent with the equity side of the court. While

we would not derogate in the least from the powers of a court of law to investigate fraud, yet cases will occur in which chancery alone can afford relief. Thus as one court may be limited, not in its jurisdiction, but in the application and extent of it, the other is unrestricted, probing, correcting and relieving fraud, however subtle, injurious or complicated.

While at law fraud must be proven, in chancery it may be presumed. *Adams on Ejectment*, 467.

The interposition of the latter is often necessary for the better investigation of truth, and to give more complete redress. 3 *Black. Com.*, 431, 437, 439.

A variety of cases has been decided and relief afforded in equity, when, from the nature of the transaction and the situation of the parties, fraud and imposition might be presumed. 3 *P. W.*, 139; *Pow. on Con.*, 21; 8 *Con.*, 370.

Early in the history of jurisprudence, the administration of justice in the ordinary courts was found to be incomplete, and hence arose the necessity of separate courts of equity, which were organized about the end of the reign of King Edward III., for the purpose of correcting that wherein the law was defective, and matters of fraud were among the chief branches to which the jurisdiction of chancery was originally confined. Soon after separate courts of equity were established in England, a fierce struggle arose between the law and equity courts in relation to the jurisdiction and powers of each; but as we trace the history of English jurisprudence, we find the prejudice which at first existed on the part of the common law courts yielding to the necessity and utility of a distinctive equity jurisprudence.

Still even at the present day, it becomes sometimes a serious question to ascertain to what extent courts of law and chancery have concurrent jurisdiction in cases of fraud. The case at bar presents a forcible illustration of this fact. Evidence was offered in the court below by the defendants, which was claimed in the argument would have shown that the patent to Chapman was obtained by fraud. This

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evidence was ruled by the court to be inadmissible; and as we think very correctly, because, as a general rule (and the patent in this case does not fall within the exception), a patent cannot be impeached in a court of law for fraud. This question underwent an able investigation in the supreme court of New York in the case of *Jackson v. Lorton*, 10 John., 22.

That case was an action of ejectment, in which the plaintiff in the court below gave in evidence *letters patent* dated 28th October, 1812. The defendant offered in evidence a patent for the same, but dated 5th March, 1812, which was objected to on the ground that it was subsequent to the patent to the lessor, and that the recitals it contained, and the allegations of mistake in issuing the prior letters patent, could not be inquired into in an action at law. He also offered parole evidence of payment in full for the lot.

The decision of the court in excluding this evidence was fully sustained by the supreme court, and Chief Justice Kent, in delivering the opinion, says:—

“It has been the uniform practice in our courts, in all questions of title, to look to the elder patent and give it effect. Nor can the court take notice of any equitable claim upon the general government which a third person might have in respect to lands in question prior to issuing the patent. We can only look to the title under the great seal, and so the law was declared in the case of *Jackson v. Ingraham*, 4 John., 163. The elder patent must therefore be impeached and set aside, before we can acknowledge any title set up under a younger patent; and the question is whether it could be impeached by parole proof in this suit.” If the elder patent was issued by mistake, or upon false suggestions, it is voidable only; and unless letters patent are absolutely void upon the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading in which the fraud, irregularity or mistake is directly put in issue. The principle has been frequently admitted that the fraud must appear on the face

of the patent to render it void in a court of law, and that when the fraud or other defect arises on circumstances *dehors* the grant, it is voidable only by suit. 1 H. & M., 187, 190; 1 Mumf., 134.

The regular tribunal for this purpose is chancery, founded on a proceeding by *scire facias*, or by bill, or by information. It would be against precedent, and of dangerous consequence to title, to permit letters patent, which are solemn grants of record, to be impeached collaterally by parole proof in this action.

In *Jackson v. Lawton*, the plaintiff in error had a much stronger case than the plaintiff here. In that case, he held a junior patent containing recitals and allegations of mistake concerning the issuing of the senior patent, and yet the allegations of mistake could not be inquired into at law. Parole proof could not be admitted to show payment. To investigate and settle all these questions he was forced to resort to a court of equity. In this case Arnold merely held a pre-emption certificate, which is not evidence of legal title, but an incipient step in the progress to title. Possessing but an equitable interest, he attempted to introduce evidence, not of fraud in Chapman in obtaining the patent, but fraud in him in procuring a deed by which Arnold was defeated in his pre-emption. But if the evidence offered had a tendency to show fraud in procuring the patent, as was claimed in the argument, it was properly rejected, for according to the decisions of the supreme court of the United States, it was not admissible for *that* purpose. *Stringer et al. v. Young*, 3 Peters, 320; *Polk v. Wendall et al.*, 9 Cranch, 87; 5 Wheat., 293; *Boardman et al. v. Reid*, 6 Peters, 328; *Bangel et al. v. Broderick*, 13 Peters, 436; *Wilcox v. Jackson*, 13 Peters, 498; *Patterson v. Winn*, 11 Wheat., 380.

In this case, the law, as laid down by Chief Justice Kent in the case of *Jackson v. Lawton*, was not only recognized as correct, but adopted by the supreme court as the established and settled doctrine. The court take occasion to speak of the various decisions which have pre-

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vailed in the state courts, in relation to the extent that a court of law will go in permitting patents to be collaterally impeached, and while they have differed, some courts holding that the patent is only *prima facie* evidence of title, and open to extrinsic evidence to impeach its validity, and others that the defects must appear upon the face of the patent to authorize a court of law to pronounce it invalid, and that unless it do so appear, the patent is only violable, and recourse must be had to chancery. The court disposes of all these various decisions, by saying that the question was settled by the supreme court in the case of *Polk v. Wendall*, 9 Cranch, 87. If any different doctrine than that laid down in the case of *Patterson v. Winn* has obtained in the supreme court, we think it will be found to have grown out of a construction which the state courts had given to their particular laws, which the supreme court will follow, especially when made in the state courts respecting title to land. For instance, in Tennessee the courts of law allow the parties in ejectment to go back to the original entry and connect the patent with it. This rule is founded on the land laws of North Carolina, which have been construed in Tennessee to permit and require it. *Blunt v. Smith et al.*, 7 Wheat., 275.

The case of *Swayzie v. Burkl et al.*, 12 Peters, 12, referred to by the counsel for the plaintiff in error, was a case that went up to the supreme court from the district of Pennsylvania, where they have no court of equity, and consequently a different rule prevails necessarily, than in those states where equity is administered by courts of chancery. *Stoddard et al. v. Chambers*, 2 How., 285, also referred to by the counsel for the plaintiff in error, was a case in which the holder of a New Madrid certificate having a right to locate it only on public lands which had been authorized to be sold, located it on lands which were reserved from sale at the time of issuing the patent, and it was consequently declared void. We do not understand that case as deciding more than this: As the location was made upon lands expressly reserved, no title could pass,

and the patent was void, and that a title acquired against law was examinable in a court of law. This does not conflict with the opinion of Chief Justice Kent in the case of *Jackson v. Lorton*, and with the case of *Patterson v. Winn*, and others cited. After a careful examination of all the authorities bearing upon the question, called upon as we are for the first time to declare the law upon this subject, we unhesitatingly adopt the language of the supreme court in the case of *Patterson v. Winn*, "That if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had not title, it may be impeached collaterally in a court of law in an action of ejectment;" but that, for the investigation of all other questions, a court of equity is the more eligible tribunal, and they ought to be excluded from a court of law.

We do not find anything in the authorities referred to by counsel for the plaintiff in error, when properly understood, as opposed materially to those decisions which have influenced us in coming to our conclusion. Much was said at bar in relation to the case of *Stoddard v. Chambers*. We cannot think the points decided in that case as conflicting at all with the great current of authority upon this subject.

The case went up upon instructions to the jury in relation to a conflict of title. We have examined the arguments of counsel and the case at length, and have not been able to find that the question of fraud was in the case at all, and yet the learned Judge who pronounced the decision takes occasion to express an opinion in relation to patents obtained by fraud, in a manner which does not apparently harmonize very well with the repeated decisions of the supreme court. The evidence in this case, therefore, was properly excluded. The facts set up in the defence, are all examinable in a court of equity. To that forum, if fraud has been perpetrated, the plaintiff in error can resort. The door of equity is always open to all entitled to relief. There fraud may be corrected, and justice

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administered. As it is not improbable that this case may come before the court in chancery, we have not thought it proper or necessary to pass upon the relevancy of the testimony offered, nor upon the position assumed in the argument in relation to Arnold's equitable title. The case must be affirmed upon the ground that the patent was not impeachable in this action collaterally for fraud, and therefore the evidence was correctly excluded.

Judgment affirmed.

D. Rorer and J. C. Hall, for plaintiff in error.

H. W. Starr, for defendant.



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A motion for a continuance, on the ground of absent papers, taken by the attorney of the party applying for the continuance, was correctly refused. When default is made by the applicant, the judgment of a justice of the peace may be affirmed in the district court.

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. This suit was commenced before a justice of the peace, and taken by appeal to the district court, where the judgment of the justice was affirmed. We learn from the bill of exceptions, that the appellants moved the court for a continuance, and assigned for cause the absence of papers, which it appears had been previously taken from the court by their attorney, and had not been returned. The neglect of their own attorney, a delinquency which they had been instrumental in producing, cannot be considered good ground for a continuance. We therefore think that their application was correctly overruled.

Objections are urged to the judgment of affirmance. It

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is contended that there should have been a trial *de novo* in the district court. But it appears by the bill of exceptions, that the judgment of the justice was not affirmed until after the appellants declined taking any further action in the matter. They thus abandoned their appeal, and in effect waived further objection to the judgment of the justice. Such default in the appellants fully justified the judgment of affirmance. That an affirmance is sanctioned by statute in such appeal cases sufficiently appears by the article regulating appeals. Rev. Stat., 333. Sections 2, 3, and 16 expressly recognize this practice in the district court. By these sections two distinct methods are provided by which such appeals may be disposed of. 1. By an affirmance of the judgment. 2. By a trial anew.

Many cases are taken to the district court for the purpose of delay, without even the expectation of disturbing the judgment of the justice, and in such cases it would be a useless expense to parties, a futile detention in the administration of justice, for courts to award a trial *de novo*. Hence, where default is made by the appellant, it would be fallacious to adopt that practice, even if the statute admitted of doubt in its construction. But we think the statute leaves no room for doubt, and that it expressly authorizes the course pursued by the court below in this case.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

L. R. Reeves, for defendant.

FLETCHER v. CONLY.

Not necessary to prove the identity of the drawee of an order before it is offered in evidence.

The acceptor of an order becomes liable to the payee named in the order, and a mere technical variance will not defeat his liability.

Judgment may be rendered against the security in an appeal bond from a justice of the peace.

ERROR TO DES MOINES DISTRICT COURT.

Opinion by WILLIAMS, C. J. William Conly, for the use of Barton T. David, commenced his suit against the defendant, John C. Fletcher, before a justice of the peace. The instrument of writing on which the action is founded is an order drawn by A. H. Judd in favor of William Conly, clerk of the steamer "Amaranth," for the sum of \$42, on John C. Fletcher, the defendant. The order bears date May 9, 1842, at St Louis, and was given to pay that amount as money due to the boat from the Marine company. The order was presented to Fletcher, and "Accepted June 13, 1842, J. C. Fletcher." A credit is endorsed on the order for \$9, of the same date with the acceptance. The parties appeared before the justice on the day appointed for the hearing, with counsel, the cause was tried, and judgment rendered by the justice against the defendant for the sum of \$43.56, debt and interest, with costs of suit.

The trial was had before the justice on the 16th of October, 1847; on the 1st of November, 1847, the defendant, with R. S. Adams, who was offered as his security for the purpose, took his appeal to the district court. The bond on file with the record of the case, however, which was executed on taking the appeal, shows that instead of R. S. Adams becoming security for the defendant, Charles W. Hunt executed it with him as his bail. The cause was tried on the appeal at the April term, 1848, at Burlington,

and a verdict and judgment thereon rendered against the defendant, and Charles W. Hunt, his bail on the appeal, for the sum of \$14.50, with costs of suit.

As to the plaintiff's right to recover, several questions were raised by defendant's counsel in the court below, and adjudicated. In deciding these, it is contended by defendant's counsel, that there is error in the proceedings of that court. The cause is here on writ of error, and the reversal of the judgment is urged on the following assignments :

1. The court erred in admitting in evidence to the jury the original order and acceptance referred to in the bill of exceptions, in manner and form as stated therein.

2. In ruling out from the jury the evidence of defendant proving the name of the person referred to in said order.

3. In rendering final judgment against said Hunt.

The bill of exceptions shows that the defendant's counsel objected to the reading of the order in evidence to the jury, on the ground that before this was done it was necessary the plaintiff should give some evidence, by which to show his identity with the drawee of the order. This objection was overruled by the court, and the order was permitted to go in evidence to the jury.

We cannot discover anything erroneous in this ruling of the court. It has been heretofore decided by this court, that the holder or promisee of a promissory note may bring his suit against the promisor and recover judgment in the name which is given to him by the maker of the instrument, when he executes it. And this is in accordance with the sound principles of justice. By allowing him to resist a recovery for this, he would be deriving an advantage from his own wrong.

The acceptance of the order by Fletcher the defendant, rendered him liable to the plaintiff Conly, for the amount called for by it. It was tantamount to a promise to pay it to him as payee, and no further evidence for the purpose of identifying Conly as the payee was necessary. The order, properly accepted, was there for the jury in the case, pro-

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duced by the plaintiff on the trial, and a recovery on it would bar a future action for the same indebtedness. This was all-sufficient for the security of the defendant.

After the order and acceptance had been read in evidence to the jury, the plaintiff rested his case. The defendant then offered a sworn witness to prove that the person referred to in said order is named *Conolly* and not *Conly*. This evidence was ruled out by the court, and this ruling is complained of as error, on the ground of variance.

The order being before the jury, and the identity of the plaintiff established for all legal purposes, so as to protect the interests of the parties to the action, we are of opinion that the evidence could have no legitimate bearing on the case, as it then was, on the part of plaintiff, submitted to the jury on the instrument itself, without objection being previously made. To avail himself of this objection, on the ground of variance, the defendant should have moved it to the court when the instrument was offered in evidence, before it had been read to the jury, and before the plaintiff had closed his part of the testimony. A practice different from that here enjoined would tend to confusion and privation of right. By permitting the order to go in evidence to the jury as he did, the defendant waived and lost the benefit of this objection. He could not thus, when he had recognized the legal position of the plaintiff in the action, introduce his testimony to resist a recovery against him on a point so technical.

In deciding this point, we remark also, that on examination of the name, as written in the instrument, it is extremely difficult to say whether it is to be read "*Conolly*" or "*Conly*." Which of them it may be is immaterial, as we are of the opinion, as to their pronounciation, that the principle of *idem sonans* may with propriety be applied.

The last assignment of error is fully answered by the record. The judgment of the court below is in perfect accordance with the requirement of the statute, which authorized judgment to be entered upon an affirmance,

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against the security as well as the defendant in the action. The appeal bond of record in the case shows that Charles W. Hunt executed it as the security of the defendant Fletcher.

Judgment affirmed.

D. Rorer, for plaintiff in error.

M. D. Browning, for defendant.



STEAMBOAT "LAKE OF THE WOODS" v. SHAW.

An instrument not under seal is not a bond.

Where an appeal is allowed under a special statute, without a bond as required, it is not error to dismiss the appeal. But if a recognizance had been filed as authorized by a subsequent general statute, the appeal should not be dismissed.

ERROR TO LEE DISTRICT COURT.

Opinion by KINNEY, J. This was an action instituted before a justice of the peace, under the "Act to provide for the collection of demands against boats and vessels." A judgment was rendered by the justice against the boat, whereupon the defendant appealed to the district court. In perfecting his appeal he filed an instrument (not under seal) with approved security, which is designated by the justice as an appeal bond. Upon the case being transferred to the district court, a motion was filed by counsel for the appellee to dismiss the appeal, for the reason that the instrument purporting to be an appeal bond was not such an one as was required by statute. This motion was sustained by the court and the appeal was dismissed.

By the bill of exceptions the only question presented for our decision is, did the court err in dismissing the appeal, or was there a substantial compliance with the statute by

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the plaintiff in filing his security before the justice of the peace for an appeal?

The statute upon which this suit was predicated provides, that in all cases arising under the "act, if judgment shall have been rendered in favor of the plaintiff, the master, owner, agent, or consignee of the boat or vessel, or other person interested, may appeal from the judgment by giving bond and security in double the amount sued for," &c. Rev. Stat., 103, § 20.

This statute clearly requires that the appealing party shall file with the justice of the peace a *bond*, if he wishes to avail himself of the benefit of an appeal. And it is not to be presumed that the legislature, in using the word *bond*, intended anything else than such an instrument as was a bond at common law, to wit, an instrument under seal. If this statute, then, were to be taken and construed independent of other statutes, and without reference to subsequent legislation, (as the instrument in this case was not under seal,) there would be no reason for legal ambiguity, and we could come to no other conclusion than that the court below was right in dismissing the appeal.

Although this statute was made for a particular and specific purpose, as it is remedial in its character, it must be taken in connection with subsequent statutes, particularly those defining the powers and duties of justices of the peace, and the way and manner of taking appeals to the district court. A remedial statute ought always to receive a liberal construction, and it should be, as it is, the tendency of modern decisions, to aid as far as possible the remedy provided by law. Particularly will the courts extend a favorable ear to those who seek by appeal to obtain that justice which they may have been legally entitled to, and of which they may have been deprived by an erroneous decision of an inferior tribunal. While parties in appealing their cases ought to be held to the requirements of the law, yet courts should reluctantly close their doors against those who have substantially complied with the statute. And this appears to be not only the spirit, but the settled

policy of our law. Rev. Stat., 335, § 7, provides, that "upon the return of the justice being filed in the clerk's office, the court *shall be possessed of the cause*, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the justice." Other sections of the statute might be quoted, by which it would seem that the legislature intended to extend to parties seeking an appeal great latitude.

The 11th section of the same act provides, that no appeal allowed by a justice shall be dismissed for the want of a recognizance, or by reason of a defective one, if the appellant will, before the motion to dismiss is determined, enter into a proper recognizance, &c., before the court: extending, as this statute does, every reasonable facility to those who wish to have their legal rights adjudicated in the higher court. But in this case, it is urged by counsel for the defendant in error, that notwithstanding this liberal language of the statute, as this was a proceeding under a particular statute designating the instrument of security to the opposite party as a *bond*, that the court did not err in dismissing the appeal.

In the absence of any statute subsequent to the one relied upon, this position would be correct. But a statute passed much later than the one in relation to proceedings against boats and vessels, expressly states, that *any* person aggrieved by *any judgment* or decision of a justice of the peace, may take his appeal to the district court. He is required to comply with certain conditions, and, among others, he shall enter into a recognizance, which shall be according to the form laid down in the statute. Rev. Stat., 333, § 34.

In this case the recognizance was given under this statute, and according to its provisions.

The statute, therefore, having been passed long subsequent to the one requiring a bond, and its language being sufficiently comprehensive to embrace every person taking an appeal from any judgment or decision of a justice, and pointing out as it does that such appeal shall be by recog-

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nizance, we find no difficulty in coming to the conclusion that a sealed instrument was not necessary in this case for the purposes of an appeal.

The court erred in dismissing the appeal.

Judgment reversed.

J. C. Hall, for plaintiff in error.

J. W. Rankin, for defendant.



WRIGHT v. MARSH, LEE & DELAVAN.

By an act of Congress, approved June 30, 1834, the qualified interest held by the half-breeds of the Sac and Fox Indians to the half-breed tract in Lee county, was converted into an absolute estate.

Records of the territorial district courts of Iowa, not to be considered as foreign in the state courts of Iowa.

The Iowa territorial district courts were not of inferior jurisdiction. They were invested with the same jurisdiction of a federal character as the circuit and district courts of the United States, and also the general common law jurisdiction usually imparted to state courts of record.

If the district court in partition proceedings was only authorized to act under the special authority conferred by statute, the jurisdiction would be *quoad hoc* limited and inferior.

Courts of equity may exercise general concurrent jurisdiction with courts of law in all partition cases at common law.

The territorial district courts, independent of the partition act, had general jurisdiction of partition proceedings both at law and in equity.

Principles of law and equity are united and applied by the partition act of Iowa.

In partition proceedings the jurisdiction of the district court is threefold:
1. Cumulative and special as created by statute. 2. Having full chancery attributes, except as otherwise provided by the act. 3. General common law authority, so far as it could be exercised with the two preceding powers.

The jurisdiction of a court can be taken away only by express words.

Where the petition contained all the allegations necessary to confer jurisdiction, but omits to describe the interest of unknown owners, the defect cannot be collaterally assailed.

The petition for partition may be verified by the affidavit of an attorney.

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Objection to the sufficiency of publication of notice, cannot be taken advantage of collaterally.

Not necessary to incorporate a copy of notice, or proof of publication, in a record from a court of general jurisdiction; and if not so incorporated, they will be presumed sufficient.

A slight deviation by commissioners, where it is necessary to an equitable partition of the property, is not fatal to the proceedings.

The final judgment of partition may properly correct any erroneous computation or inaccuracy in the report of the commissioners.

A partition of real property under the statute is made complete by the judgment without conveyances.

In a court of general jurisdiction, authority will be presumed until the contrary clearly appears.

Where the record of a final judgment shows that the subject matter and the parties were properly before the court, the judgment becomes conclusive, and cannot be collaterally impeached.

Since the act of Congress of 1834, the half-breed lands in Lee county have been subject to the laws and courts of Iowa, to the same extent as other lands owned by individuals.

No statute can constitutionally derogate a vested right.

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. This was an action of right, commenced in September 1846, by Marsh, Lee & Delavan against Mitchell D. Wright. The land claimed in the declaration is described as the south-east quarter of section 23, and the west half of south-west quarter of section 24, in township 65, north of range 5 west, and is a portion of the land known as the "half-breed tract" in Lee county.

Declaration and pleas to the merits filed in the form provided by the statute. Rev. Stat., 533. Trial before Hon. Geo. H. Williams and a jury was commenced June 2, and on the 10th of the same month a verdict was returned, and a judgment thereon rendered for the plaintiffs below.

On the trial, it appears that the plaintiffs proved the location of the land in dispute as being comprised within the "half-breed tract," and that the defendant was in possession of it before and after the commencement of this suit, thereupon all the treaties between the United States and the Sac and Fox tribes of Indians, together with the act of Congress, and the territorial laws in relation to the

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cession, transfer and partition of the "half-breed tract," were by agreement admitted in evidence, subject to all legal objections. The record of a judgment under which said tract was divided among the respective claimants, was also admitted in evidence. The defendant interposed several objections to the admission of this record, and these objections comprise the principal questions of law involved in the trial of this cause. Before entering upon the discussion of these questions, we will refer to the various treaties and laws affecting the land in question, and state the leading features of the partition proceedings.

The half-breed tract, formerly a portion of the Louisiana purchase, is a reservation of land made by the Sac and Fox tribes of Indians, in a treaty concluded with the United States, August 4, 1824, by which those tribes relinquished to the United States all their right, title, interest and claim to the lands which the said Sac and Fox tribes have, or claim, within the limits of the state of Missouri, which are situated, lying and being between the Mississippi and Missouri rivers, and a line running from the Missouri at the entrance of the Kansas river, north one hundred miles to the north-west corner of the state of Missouri, from thence east to the Mississippi. It being understood that the small tract of land lying between the rivers Des Moines and Mississippi, and the section of the above line between the Mississippi and the Des Moines, is intended for the use of the half-breeds belonging to the Sac and Fox nation. They holding it, however, by the same title, and in the same manner, that other Indian titles are held. 7 U. S. Stat. at large, 229. The tract of land thus reserved and designated for the use of the Sac and Fox half-breeds contains about 119,000 acres. It will be observed that this tract was not in the state of Missouri, and consequently not comprised within the boundaries of land ceded by the above treaty to the United States, and still the reservation contains definite boundaries, and is sufficiently appropriated to the use intended. But as it was **not** comprehended in the cession to the United States, it

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might be assumed that they acquired no other control or jurisdiction over it than they have in other lands possessed and retained by Indian tribes, and that the Sacs and Foxes held a reversionary interest in the tract upon the extinction of their half-breeds. This state of things, however, did not long continue, for by another treaty concluded at Fort Armstrong, in September 1832, the said half-breed tract was included in the cession of lands then made by those tribes to the United States. 7 U. S. Stat. at large, 374. Hence it must be concluded that, by the treaty of 1824, the Sac and Fox half-breeds acquired a right of property and possession in the reserved tract of land, under the limitation that they should hold "by the same title, and in the same manner, as other Indian lands are held;" and by the treaty of 1832 the cession made by those two tribes released to the United States their reversionary interest, and with it every vestige of their authority and control over the land. By an act of Congress, approved June 30, 1834, the qualified interest held by the half-breeds in the land in question was converted into an absolute estate in fee. This act relinquished and vested in said half-breeds "all the right, title and interest which might accrue or revert to the United States to the reservation of land," describing it as reserved by treaty of 1824, and then the act proceeds to vest them "with full power and authority to transfer their portions thereof by sale, devise or descent, according to the laws of Missouri." 4 U. S. Stat. at large, 741, chap. 167.

The half-breeds, availing themselves of the right, fee and alienation thus acquired, transferred their interest to a large extent to other individuals.

On the 14th of April 1840, Josiah Spalding and twenty-two others filed a petition in the district court of Lee county for a partition of the tract among the respective owners. The petition named Euphrosine Antaya and several others as defendants. The petitioners set forth that they have a legal title to and are seized in fee of twenty-three and one third full shares, and 5135 acres of land in

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that tract commonly called the "*half-breed tract*." The petition then describes the situation and boundaries of the tract, alleging that it contains "119,000 acres, more or less." The particular claim or share of each petitioner, with the name of the person or persons from whom derived, is defined in the petition; and in referring to the interest of the defendants named in the petition, it avers, that they, their heirs and assigns, and other persons whose names and places of residence are unknown to your petitioners, are tenants in common with your petitioners in said premises. To this petition is appended the affidavit of one of the attorneys for the plaintiffs that the facts therein set forth are true, to the best of his knowledge and belief. A writ of summons was issued and returned that the defendants therein named were "not found," and thereupon, at the April term of the district court, an order of publication was made. At the October term following, a record entry appears in these words: "On this day came the petitioners by Reid & Johnston, their attorneys, and made proof of the publication of the notice ordered to be made at the April term, 1840." This notice sets forth, "That a petition was filed on &c., by &c., against &c., and is now pending, wherein the petitioners pray that partition may be made of the following real estate, (describing it,) and the said defendants and all other persons interested in the said property are requested to appear and answer said petition on &c., or the proceedings had in the cause thereof will be binding and conclusive on them for ever." Attached to a copy of the notice is the affidavit of John H. McKinney, then publisher of the "Iowa Territorial Gazette," in which he swore that the notice had been published in that paper for twelve consecutive weeks, &c. At the said October term, additional parties were on application admitted as plaintiffs to the petition; and several persons made their appearance as defendants, and time was given them to file their answers. At the April term 1841, all the defendants, named and not named, in the petition, appeared and answered, except Euphrosine Antaya, and in their answers

set forth their respective titles; and by consent the court tried the cause, and entered a judgment of partition. In setting forth the inducement and the action of the court in the premises, the judgment recites as follows: "In this case said defendants having appeared by their counsel respectively, and filed their answers to the petition, stated and produced their respective claims, and exhibited their proofs, in some instances the original conveyances, and in others authentic copies of conveyances, by which the same are held, and their said respective claims, and those of the petitioners by their counsel respectively, being by consent submitted to the court for adjudication and partition, according to law, and the court being satisfied by sufficient proofs that the publication required by the act entitled 'An act to provide for the partition of real property' has been duly made, and no other persons known or unknown having appeared or made any claim or objection to said partition, and the said claims of the said parties now before the court, petitioners and defendants, and their respective proofs and conveyances, being by the court heard and considered, it is therefore, by the consideration of the court, and with the consent of the said parties, this 8th day of May, A.D. 1841, ordered and adjudged that the claims of rights of the said parties respectively to the undivided portions of the land mentioned and described in said petition, amount in the whole to one hundred and one equal portions, and that of these, Marsh, Lee & Delavan, trustees for the claimants under the articles of association dated October 22, 1836, filed in this case, and as trustees for persons interested under said articles, are entitled to forty-one shares," &c. The judgment then sets forth the undivided portions to which the other defendants and the petitioners were respectively entitled, and ordered that they should be confirmed accordingly, and that partition of the tract should be equally and fairly made among the parties, petitioners and defendants, to the exclusion of all other persons. The judgment designated Samuel B. Ayers, Harmon Booth and Joseph Webster, as commissioners to

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make the partition into one hundred and one shares of equal value, and report the same to the court for confirmation. At the October term, 1841, of said court, the commissioners presented their report, dividing the land into shares as they had been directed, excepting certain islands in the Mississippi and Des Moines rivers, which are reported to be so situated that partition could not be made of them without prejudice to the owners, and they therefore recommend that they be sold. By consent of counsel and all the parties concerned, the court then ordered, adjudged and decreed that the report and all things therein contained be ratified and confirmed; also ordered the allotment of shares to be made by the commissioners with specific directions. The judgment or decree of partition, the report of the commissioners designating particular property under each share as numbered and divided by them, the final judgment of confirmation, and the allotment of the various shares to the respective owners are set forth in detail and with clearness on the record. So far as this record discloses the proceedings, they appear to have been conducted with fairness, deliberation, and a particular regard to the regulations of the statute. Every important order in the partition appears to have been made by consent of all the parties concerned. The record shows that the land in question is included in that which was set apart by the allotments under the partition to the plaintiffs below, and this constituted the only evidence of their title to the premises. The principal questions raised for adjudication are in relation to the admissibility of this record as evidence. We will proceed to consider the various objections urged to the partition.

1. It is contended that the territorial court, which rendered the judgment of partition, must be considered under our state organization as a foreign court. As the authentication of the record was not questioned in the court below, this point cannot be entertained as an objection to the record in this particular. But the foreign character of the territorial court is also urged

to detract from the authenticity and conclusiveness of the record, to remove those presumptions of law which would otherwise apply in its favor. It may well be questioned whether this would be the effect of the partition record, even if it should be considered the adjudication of a foreign court. Such, at least, could not be the effect if we should be governed by the weight of English authorities. The decisions of the American courts upon this point have been various and conflicting. All agree, however, that the record of a decree or judgment would be at least *prima facie* evidence of correctness, and many have affirmed the English doctrine that it would be conclusive if the adjudication was definitive and made by a court of competent jurisdiction. But the determination of this question is not necessarily involved in the trial of this cause. We can by no means arrive at the conclusion that our territorial court should be regarded as a foreign tribunal, and as a consequence, it is unnecessary in this case to decide what would be the effect of a record from a foreign court. We have carefully examined the arguments and authorities which counsel have ingeniously presented, in attempting to show that the district courts of the territory of Iowa should be adjudged as foreign when records emanate from them to the district courts of the state of Iowa; but we can see no good reason, in fact or in law, for thus regarding them. In what way could this change in our form of government so completely estrange and alienate our territorial courts? By this change our former courts were not transferred to a foreign soil, nor their records entrusted to foreign hands. No rights which had been acquired, no proceedings which had been perfected or commenced under our territorial courts, were relinquished or abated by our assuming state sovereignty. Under the 13th article of our state constitution, judicial proceedings, claims and rights are continued as if no change had taken place in the government; the same laws were continued in force until repealed, and even the same officers, civil and military, are authorized to act until suspended. Independent

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of the connecting link existing between our territorial and state courts *ex necessitate rei*, we find them bound together under the same sovereignty by constitutional provision. So far from having been expatriated by our constitution and new form of government, it will be observed that our territorial courts were not at first even suspended, but were ultimately merged and perpetuated into state courts. Proceedings commenced in the former were conducted to final judgment in the latter. Even the judges and clerks in the one were continued for a time in the other. They were both constituted within the same territorial limits, appointed to adjudicate within the same venues, upon the same realty, and among the same people; and thus far the records of the two courts have generally been entered in the same books. They are preserved in the same offices, under the charge and keeping of the same clerks, and are alike subject to the inspection of our citizens. Why, then, should the records of our former courts be regarded as foreign by our present courts? Those of our territorial courts, except in cases of a strictly federal character or jurisdiction, have become the property of the state by appropriate and legitimate descent. They are properly retained and controlled by our state courts, and copies may be authenticated by them for the use of those who may be interested in them. In thus concluding that our territorial records are as much under our state jurisdiction, and are as domestic in their character, as are those of our state courts, we have not overlooked the decision of the supreme court of the United States in *Hunt v. Palao*, 4 Howard, 589. This was a case of federal jurisdiction, cognizable only before a court of the United States—a case over which no state could exercise authority or control, and consequently it is not applicable to the question at bar. An act of Congress, approved February 22, 1848, in relation to the records of our territorial courts, recognizes the transfer of all such records to the state, excepting the records of a federal character, and even those the respective clerks are authorized to retain, and, upon application by any person interested, make

and certify a full and complete copy of the same to the clerk of the district court of the United States, so far as it can be done without mutilating the records of the territorial courts. See Laws of 30th Con., 1st sess., p. 8, § 3. These various considerations, we think, clearly establish the domestic character of our territorial courts as predecessors of our state courts. *Beatty v. Ross*, 1 Branch, 188.

2. It is urged that the district court which rendered the decree was one of inferior and limited jurisdiction. In support of this position, counsel have cited 2 McLean, 126; 1 Kent's Com., 303; 2 U. S. Cond., 37, 405; 2 Howard U. S., 21; 6 *ib.*, 39. These authorities pertain exclusively to the jurisdiction of the circuit and district courts of the United States, and have no bearing whatever upon the territorial district courts, nor do the authorities cited hold that those United States courts are of inferior jurisdiction. They are limited, but not inferior. Their proceedings, therefore, are not nullities, even if their jurisdiction does not appear of record, and if not reversed for that defect, those proceedings are conclusive evidence between parties and privies. *McCormick v. Sullivant*, 10 Wheat., 192; *Turner v. Bank of N. A.*, 4 Dallas, 8; *Reed v. Vaughn*, 10 Mis., 447. If, then, the circuit and district courts of the United States are not of inferior jurisdiction, *a fortiori* the territorial courts are not, for the latter are not only invested with the same extent of jurisdiction as the former in proceedings of a federal character—*Lorimer v. State Bank of Ill.*, Morris, 223—but also the general common law jurisdiction usually imparted to state courts of record. The 9th section of the Iowa organic law provides, that the several courts thereby created, both appellate and original, shall be as limited by law, and that the supreme and district courts respectively shall have a chancery as well as a common law jurisdiction. The territorial district courts, in addition to the federal powers conferred upon them, were invested with extended and general jurisdiction over actions real, personal and mixed. Under this general jurisdiction they were authorized to try and determine,

according to the course of the common law, all ordinary actions, both local and transitory. They were also invested with a special jurisdiction, conferred by legislative enactment, in proceedings which could not be entertained as actions at common law. The term inferior courts, in a strict and technical sense, is only applicable to courts of a limited and special jurisdiction, in which the proceedings are not according to the course of the common law, but defined by statutory regulations. It must be obvious that our territorial district courts cannot be included under that term. They were endowed with all the general powers and universal attributes of common law jurisdiction. Their authority was general, and superior to all but the supreme court. Justices of the peace, county commissioners and probate courts, were all subordinate and inferior to them. In one sense, in one connection only, can they be regarded as inferior tribunals, and that is in relation to the supreme or appellate courts before which their judgments might be taken for revision. Still their powers are general, their jurisdiction in legal contemplation is not limited or inferior. Many authorities in relation to superior and inferior courts may be found collected in 3 Cow & Hill's Notes to Phil. Ev. n. n. 691-4. But it is contended that, if the district court which rendered the decree did possess general jurisdiction, it acted in the partition proceedings under special authority conferred by statute, and was consequently *quoad hoc* an inferior or limited court. If in such proceedings the court possessed no authority beyond that conferred by statute, this position could not be controverted. And if the court was thus limited in jurisdiction, it will not be questioned that the course prescribed by the statute ought to have been observed with at least substantial exactness, and every fact necessary to show jurisdiction ought to appear on the face of the proceedings. Under this view of the case, various objections are urged to show that the proceedings were not in accordance with the partition act, and consequently nugatory.

3. As preliminary to these objections, it is averred, that

the district court, in making the partition, could only act as a court of chancery. This position is assumed in order to show that the proceedings should have been conducted within the limits, and under the regulations, of equity jurisprudence. It may be well to remark upon the powers of the district court, independent of the statutes. The doctrine is now universally conceded, that courts of equity may exercise a general concurrent jurisdiction with courts of law in all partition cases. Nor is equity jurisdiction limited to such cases only as are relievable at law, but in making partition, equity will generally follow the analogies of the law, and extend relief in all cases where, by rules of law, it would be regarded as appropriate, and also in many cases where those rules would not furnish a plain, complete and adequate remedy. Mitford's Eq. Pl., 209; 1 Story's Eq. Jur., 646, 658.

At common law the writ of partition may be traced to a very remote period, but the benefits of that writ could only be extended to coparceners, until 31 and 32 Henry VIII., c. c. 1 and 32, by which joint tenants and tenants in common might be required by writ of partition to divide their lands. 2 Black. Com., 185, 194. A jurisdiction thus extended to common law courts, by statutes of so old a date, since which much that is common law has taken its origin, it may well be assumed that common law courts might inherently exercise that extended jurisdiction. This conclusion is necessarily embraced in that advanced by Judge Story and other elementary writers, that in partition proceedings, courts of law have general concurrent jurisdiction with courts of equity. Story's Eq. Jur., 658. And in either court, principles of common law would obtain in testing the title or rights of the respective claimants before entering a decree or judgment of partition. We are of the opinion, then, that our territorial district courts, independent of the partition act, had general jurisdiction of partition proceedings, both at law and in equity.

The question now recurs, does the statute providing for the partition of real property, Rev. Stat., 458, confine cases

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of partition within the limits of equitable jurisdiction? We are enabled to find any clause in that statute which will justify an affirmative answer. It is neither made an action at law nor a proceeding in chancery, but the principles of both are united and applied to the statute regulations. The act provides for a petition and answer, and other proceedings, as in equity. It also provides for a service by summons, for issues of fact, and trials by jury, for the rendering of judgments, and for writs and assignments of errors, and other proceedings, as at law—§§ 2, 10, 12, 13, 14, 16, 19, 36, 49, 56, 63, 64 and 65. Section 56 provides that the proceedings authorized by the act are intended as a substitute for all partitions in chancery, as well as at law, and the court is authorized to exercise equity powers except as therein otherwise provided. The act generally contemplates the exercise of common law powers. The last four sections of the statute clearly authorize proceedings at law. Section 62 declares, "That if the petitioners for any partition become *nonsuit*, or suffer a discontinuance, or a verdict shall pass against them, or judgment shall be rendered against them on demurrer, they shall pay costs, to be recovered and collected as in *personal actions*." The next section provides, "That upon any final judgment, rendered pursuant to the provisions of the act, *a writ of error may be brought, &c., in the same manner as in personal actions*." And the last section provides, that "judgment may be given by the court above, either for affirmance or reversal in part or in whole, or a new adjudication of the matter may be directed in the court below. The proceedings in other respects shall be the same as in *personal actions*." Evidently this act does not sustain the point made by counsel, that in making partition the court was confined to chancery jurisdiction. The jurisdiction of the court was threefold: 1. It was invested with all the cumulative and special powers created by the statute. 2. It retained all chancery attributes except as otherwise provided by the act. 3. It retained all its inherent common law authority so far as it could be exer-

cised consistently with the two preceding powers. The three jurisdictions are comprised in and are more or less exercised in all partition suits under that act. The requirements of the statute, so far as they are especially substituted for equity and common law proceedings, are paramount, but beyond such special substitution, law and chancery interpose, with unabated and general concurrent authority. Hence, we conclude that even in cases of partition under our statute, the district court cannot be considered *quoad hoc*, as inferior or limited. The doctrine will not be questioned that the general jurisdiction of a court cannot be taken away unless by express words of exclusion. The statute in question has only enlarged and united powers previously existing in the court, and modified the proceedings under those powers, and therefore there is no reason why the same liberal rule should not be applicable to support the presumption that the court acted correctly and by competent authority.

But before deciding upon the admissibility and conclusiveness of the partition record, it may be well to examine the several objections urged to the partition proceedings. One point made is, that the petition does not describe the respective interests of all the joint owners; nor, if their names were unknown, does it state that fact. In this particular, it is true, the petition is not sufficiently specific and certain, but this is far from being a fatal defect, or one which can involve a question of jurisdiction. The petition described the land with certainty, averred that the parties owned it as tenants in common, and prayed for a partition thereof among the respective owners. In a word, the petition contained all the allegations necessary to confer jurisdiction upon the court to act in the premises, but it omits to describe the interest of unknown owners. Such a defect in form might have been good cause for demurrer, and if demurred to, might have been amended to a literal compliance with the statute. But it is by no means a defect which could impeach the proceedings, or be taken advantage of after judgment, much less does it amount to

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a defect which can be collaterally assailed. We have carefully examined the authorities cited by counsel upon this point, but we can see nothing in them inimical to our conclusion.

Another objection presented is, that the petition was not verified by such an affidavit as the law requires. All that the statute directs upon this point is, that "the petition shall be verified by affidavit." Rev. Stat., 459, § 2. We have already noticed that the petition was verified by the affidavit of one of the attorneys. But it is alleged that such an affidavit is not reconcilable with the object and spirit of the statute; that it should have been made by the plaintiffs named in the petition, or at least by some of them. It would be difficult, we think, to apply any rule of construction to the statute which can justify this position. The act does not require, nor can we see any necessity for its requiring, the affidavit to be made by the petitioners themselves. If a petition is verified by affidavit, it is strictly conformable to the statute, and it can make no difference whether it is made by a petitioner or by his attorney, or by any other person who may feel himself sufficiently acquainted with the facts averred to justify him in making the affidavit. But if the affidavit was insufficient, the objection comes too late. It was not an element of jurisdiction without which the court could not act. It was merely a formal part of the petition, a preliminary form in commencing the suit, and if objectionable or insufficient, the question should have been raised before answers were filed. After answering, it must be considered as waived. Besides, if the affidavit was defectively made, it but amounts to one of those irregularities which could not be collaterally questioned, even if the proceedings had taken place before an inferior tribunal. It is next objected that the court acquired no jurisdiction over the unknown owners in consequence of the defective publication. The record, it is true, does not disclose publication to the full extent required by the 9th section of the partition act. That section provides for the publication of notice for twelve weeks

successively in some newspaper printed most convenient to the place where the court was held, and for four successive weeks in some newspaper printed at the seat of government. The twelve weeks publication appears to have been regularly made, but the record is silent as to the other,* with the exception of a recital in the partition judgment that the petitioners, by their counsel, made proof of the publication of the notice previously ordered by the court. It appears, then, that proof of publication was before the court. It was considered, and the publication adjudged, to be such as was required by law. It became a decision of that court upon a matter *coram judice*, and whether made upon sufficient or insufficient proof, whether the court decided correctly or erroneously as to the adequacy of the publication, it cannot, in this proceeding, become a subject of inquiry. It was a question which that court alone had the original right to determine, and within its legitimate jurisdiction did decide that the publication was sufficient. If erroneous, the party affected by it had his remedy; he could have had the decision revised and corrected on writ of error, and upon that writ only was the question subject to re-examination.

As the record comes from a court of general jurisdiction, it did not become necessary to incorporate into it a copy of the notice or the proof of publication. Without these, the record would have been sufficiently authentic and conclusive. The authority of the court over the subject matter and over the parties, and the correctness of the proceedings, would have been favored by all the force of legal presumption.

Objections are also urged to the proceedings of the commissioners in neglecting to follow the order under which they were appointed and the judgment of partition.

* The other notice for four weeks, required by the statute, was published in the "Iowa Patriot," and the proof of publication was properly made and filed; but was left out of the transcript by the oversight of the clerk of the district court in making out the copy of the proceedings in the partition suit for the supreme court, in this action of right.

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But we can see nothing in those deviations which should invalidate the proceedings, especially as they were indispensable to a just and equitable partition of the property, were made by consent of all parties who had adduced evidence of title before the commissioners, or who were known to be legally interested in the tract, and were fully confirmed by the court.

The final judgment is also assailed as being a departure from the commissioners' report. We can discern no foundation for this objection. The court corrected an erroneous computation made by the commissioners as to the number of shares, by deducting small portions from three of the defendants by their consent, and by consent of all parties. Without such correction, inaccuracy, injustice, and confusion would have resulted from a confirmation of the report; but with it the rights and claims of all were satisfactorily adjusted. Such a correction cannot be regarded as a departure, as a deviation, or as an unwarranted exercise of judicial powers.

The want of conveyances to the respective proprietors, under the partition, is also presented as a deficiency. Although this question cannot affect the admissibility of the record, it may be well to determine whether deeds are necessary in a partition of real estate, under the statute. A partition in equity proceeds upon conveyances to be executed by the parties, or in default by commissioners. *McClay v. Bowman*, 1 Littel, 248; 1 Story's Eq. Jur., § 652. But a partition at law operates by virtue of the judgment. A final judgment of partition is conclusive evidence of title in the parties to the extent therein designated. The statute does not authorize a *decree*, but it expressly requires a judgment of partition, and a judgment of confirmation. Section 19, Rev. Stat., 461, enacts, that "after all the shares and interests shall have been settled in any of the methods aforesaid, *judgment* shall be rendered confirming such shares and interests, and that partition be made accordingly." Section 35 provides, that "upon the report of commissioners being confirmed, judgment shall thereupon be

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rendered that such partition be firm and effectual for ever ;” and the next section concludes, that the judgment aforesaid shall be binding and conclusive upon all persons whatsoever. It is a fact worthy of notice, that the word *decree* is not used in the statute to designate any order or decision to be made by a court in partition proceedings. Therefore the record before us must be considered that of a judgment, and as such, is *per se* conclusive evidence of the rights and title therein adjudged without the formality of conveyances. We are aware that in our state an order of partition is usually denominated a “decree” or “decree of partition,” but such designation is not authorized by the statute nor by the character of the proceedings. Though in a measure obtained by the interposition of chancery practice, it is nevertheless a judgment of partition, and such should be its style. Rev. Stat., §§ 62, 63, 64, 65. We have thus separately noticed these various objections to the record of partition, in order to settle the practice in future analogous cases. But they might have been collectively and more summarily disposed of on general principles. Collaterally such objection can never prove availing, especially when applied to the record from a court of general jurisdiction in which power and authority will be presumed until the contrary clearly appears. In *Shumway v. Stillman*, 4 Cowen, 294, 296, in an action of debt, or a judgment from the common pleas of Massachusetts, it was held, “Every presumption is in favor of the jurisdiction of the court, the record is *prima facie* evidence of it, and will be held conclusive until clearly and explicitly disproved.” So also in *Mills v. Martin*, 19 John., 33; *Thomas v. Robinson*, 3 Wend., 267; *Peacock v. Bell*, 1 Saund., 73, *et seq.*; *Wheeler v. Raymond*, 8 Cow., 311; *Smith v. Rhoads*, 1 Day, 168; *Granger v. Clarke*, 9 Shep., 128; *Van Dyke v. Bastedo*, 3 Greene, 224.

We regard it, then, as well settled that a want of jurisdiction will not be presumed in a court of general authority, and where the record from such a court is silent or does not aver all the facts necessary to show that jurisdiction

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was properly exercised, it will still be presumed that the court legally acquired power over the subject matter, and over the parties. That the subject matter of partition was cognizable by the district court has not been controverted, and we think it has been sufficiently demonstrated that the court has both general and superior original jurisdiction over such proceedings. The sufficiency of the petition in form and substance, and in verification; the adequacy of the publication, which the statute declares shall be considered equivalent in all respects to a personal service of the summons, (Rev. Stat., 460, § 9;) and the correctness of all other proceedings in the case, to give the court jurisdiction not only *in rem* but also *in personam*, were questions within the exclusive purview of that court; they are solemnly adjudicated, and that judgment, in the language of the statute, "shall be binding and conclusive upon all persons whatever." Rev. Stat., 462, § 36. The correctness of that judgment having never been directly questioned before an appellate court, the rights of property resulting from it should be admitted as valid, conclusive and effectual. Every man interested in the property had ample opportunity to appear and assert his rights. The door was open to all, the notice was extended to all, an abundance of time given for all to prove their claims and to controvert the rights of others. In justice to the proceedings, it must be observed, that they appear to have been conducted with calmness, with deliberation, and with a commendable regard to the requirements of law and the ends of justice. The parties as owners of the "half-breed tract" appear from the record to have been represented by counsel with but one exception, and her rights appear to have been protected by the court; and the fact that the judgment was rendered by general consent when the parties were numerous, and their rights greatly conflicting, gives strength to the conclusion that the rights of all were consulted in the partition, and that all things of a defective or erroneous character were waived. If any one was aggrieved by the proceedings, he had an opportunity to

move for an arrest, or that they be set aside for any irregularity or neglect to conduct them according to the rules of law; or if the court decided erroneously in any particular, the parties injuriously affected thereby had their remedy. A writ of error from the supreme court might have been sued out within the time wisely limited by law, and under that writ any defective action of the court might have been reversed and corrected. But the time prescribed by law for the motion, and for the writ of error, was suffered to pass, and by silent acquiescence, by general tacit consent, the judgment has become invulnerable, except for fraud, even against a direct assault upon it, before an appellate forum. If thus removed beyond judicial control, and rendered irreversible in any direct proceeding, manifestly there could be no assailable point in the judgment when collaterally drawn in question. If judgments and decrees could be thus collaterally avoided, there would be no certainty, no security in judicial actions. No confidence could be reposed in titles thus acquired, no protection afforded to those who might innocently purchase under them. By the solemn judgment of a competent tribunal, a large tract of land might be set apart to legal owners, under them many others acquire title, make valuable and extensive improvements, and after reposing in the quiet enjoyment of their possessions for many years, have all their rights to the property involved in doubt or destroyed by an evasive collateral proceeding at law. Under so pernicious a doctrine, general distrust and odium would attach to judgment titles. In a collateral proceeding before one court to-day, a judgment, if merely voidable, might be declared a nullity, but to-morrow, before some other tribunal, be adjudged good and valid; and thus endless disputes and uncertainty, rank injustice and oppression, would be encouraged by the tribunals of justice, which were instituted to suppress these evils. But fortunately for the rights of citizens and the security of property, such a rule has been but seldom recognized by enlightened courts. There is perhaps no feature in our judicial system

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more worthy of commendation than that all decisions made by constitutional authority are final, conclusive, and effectual for ever, unless the injured party directly and properly object to the decision before an appellate power, within the time judiciously limited by law. This doctrine has been fully confirmed, and its correctness most forcibly illustrated, by the highest American courts. *Voorhees v. Bank of U. S.*, 10 Peters, 449. The leading principles decided in this case were based upon long established and even elementary rules of common law, and were made conformable to many previous decisions by the same exalted tribunal. In *Kempe's Lessee v. Kennedy*, 5 Cranch, 173, 187, the doctrine emanates from the supreme court by Chief Justice Marshall, that the inferior court of common pleas for a county in New Jersey possessed general jurisdiction, and although its judgment was erroneous, it was not void. In *Stillman v. May*, 6 Cranch, 267, the record before the court did not contain the requisite averments of jurisdiction, but it was still held obligatory as a decree. In *Williams v. Ameroyd*, 7 Cranch, 424, 434, Chief Justice Marshall says, "That the sentence is avowedly made under a decree subversive of the law of nations, will not help the appellant's case in a court which cannot revise, correct, or even examine that sentence." If an erroneous judgment binds the property on which it acts, it will not bind that property the less because that error is apparent; of that error advantage can be taken only in a court which is capable of correcting it. The above cases in Cranch are reviewed in *Ex parte Watkins*, 3 Peters, 193, and fully confirmed; and in a more recent case the same principles were elaborately discussed, and re-affirmed in an able opinion by Judge Baldwin, whose wisdom and correctness in all jurisdictional questions is universally conceded. *Grignon v. Astor*, 2 How. U. S., 319. By applying to the record in the case at bar the principles so clearly settled and deliberately determined by the supreme court of the United States, its admissibility cannot be doubted. It discloses more than is essential for a record from a court

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of general jurisdiction. It was enough for the record to show the subject matter and the parties before the court, the exercise of judicial power in relation to them, and a final judgment. If no appeal is taken, or writ of error sued out within the limitation prescribed by statute, that judgment becomes conclusive. The record of it is absolute and incontrovertible verity, and the judgment having been rendered by a court of competent jurisdiction over the subject matter, can be impeached only by showing fraud. In short, no other than an appellate power can inspect the proceedings behind the judgment. And these principles are especially settled in their application to courts of record which possess an original general jurisdiction, the power to hear and determine causes generally. Such a court possesses within itself, as a part of its organization, the power to decide all presented questions of jurisdiction within its authority, and to exercise that jurisdiction to a final judgment, which becomes conclusive of all matters decided upon within its jurisdiction, without setting forth in the proceedings the facts, circumstances or evidence upon which the cause was determined. 2 How. U. S., 340, 341. Apply these comprehensive and well settled principles to the partition record in this case, and all doubt as to its verity, conclusiveness and admissibility must be removed. The case of *Denning v. Corrin*, 11 Wen., 647, does not, it is true, altogether harmonize with this conclusion, and with what must be regarded as the well-established doctrine at this day, even in the New York courts.

But if that case is not virtually overruled, we could give it no force as authority to the question at bar. It was made upon a different statute and upon a different state of facts. An affidavit that the owners were unknown was required before an order of publication, but the record was silent as to the affidavit and publication. In this state no such affidavit, preliminary to an order of publication, is required, and the record before us is by no means silent as to publication. In that case no proof of publication

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appeared of record; in this the record sets forth the proofs and publication, but they are alleged to be insufficient and defective, consequently they could be regarded even in New York only as error, as voidable but not void. 8 Cow., 370. *Denning v. Corwin* appears to have been decided on the ground of limited jurisdiction, but even on that ground, the case seems to have lost force and authority in subsequent decisions. In *Foot v. Stevens*, 17 Wend., 483, the principle prevailed that parties against whom judgment was rendered shall be presumed to have been regularly before the court unless the contrary expressly appears; and in *Hart v. Seixas*, 21 Wend., 40, the court questioned *Denning v. Corwin*, and held that the partition in that case should have been considered voidable only and not void; and in *Bloom v. Burdick*, 1 Hill, 141, that case is declared to have been overruled so far as the doctrine is asserted that the judgment of a superior court will be void if the record does not show jurisdiction. The proof of notice required in *Denning v. Corwin*, is also virtually overruled in *Butler v. Mayor of N. Y.*, 1 Hill, 489, in which it was held that due notice to the parties of the time and place appointed for the meeting of arbitrators is to be presumed until proved that it was not given. In this case, Judge Cowen remarks, "Even that the party has had no notice would be an objection never yet, I apprehend, allowed in such case against the inference arising on the record, though I admit there are *dicta* which countenance its reception." In *Cole v. Hall*, 2 Hill, 627, we find a case in point. This was an action of ejectment, in which the defendant offered the record of a partition judgment against unknown owners who made default, and a partition was awarded. The commissioners reported, and set off 358 acres of the land as the plaintiff's half. The report was confirmed, and judgment of partition rendered, with an award of \$29.28 costs against the unknown owners, and their respective shares were sold on a *fi. fa.* for that sum to the plaintiff in the partition suit. It was held that in that suit

the plaintiff's seizin might have been contested, but not in the collateral proceedings. And in relation to the other objections, Judge Cowen, in delivering the opinion of the court, said, "But it was said on the argument that no proper affidavit was made, nor any notice published, and that only two of the commissioners met and deliberated. It would be enough to answer that here was jurisdiction and a judgment, that such matters of mere irregularity cannot be enquired into collaterally." And in a case still more recent, from New York, principles are recognized which show an affirmance of the above doctrine. It is declared in *Bruen v. Hone*, 2 Barb., 596, that a judgment or decree of a court possessing competent jurisdiction is final, not only upon matters actually decided, but also upon matters which the parties to the cause might have had decided. The court also held, that "after a recovery by process of law, there must be an end of litigation, otherwise there will be no security for any person." And again, they assert, "It is evidently proper to prescribe some period to controversies of this sort, and what period can be more fit and proper than that which affords a fair and full opportunity to examine and decide all their claims?" Surely a rule so salutary, so indispensable to the protection of property in the hands of innocent purchasers, so vital to the stability of courts and the efficient administration of justice, should not be limited to controversies of any particular sort; it should be universal in its application. It is true, that if the proceedings from a court disclose an absolute want of jurisdiction over the subject matter, or over the parties, no limitation of time could impart vitality to them. But a want of jurisdiction cannot be presumed. The law presumes that all courts proceed with authority and correctness. This presumption applies with peculiar force to courts of general jurisdiction, but when a court proceeds merely in a ministerial capacity, or under a limited authority, defined and regulated by statute, and when certain things must appear to have been done, as preliminary to jurisdiction, or the exercise of powers, such

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presumption does not obtain, or at least not to the same extent, and therefore authorities in relation to such ministerial and inferior proceedings can have no bearing upon the present record, and need not be examined. Under the foregoing principles of law, which we regard as well settled and influenced by the various authorities cited at bar, we are united in the conclusion that the partition record was properly admitted, and became conclusive evidence of the legal rights and title of the respective parties as therein designated; and as all persons were made parties to the partition suit, all are estopped by the record in this proceeding. In arriving at this conclusion, it necessarily follows that we attach no importance to the objection that the half-breed tract was Indian land, and not subject to the territorial legislation of Iowa. We think that the statement of facts, and the reference to the treaties and laws of Congress contained in this opinion in relation to the lands, are all the arguments necessary to show that they came in a legitimate and conclusive manner under our territorial laws. Since the act of Congress of 1844, how can the character of these lands be questioned? They at once acquired all the characteristics, all the advantages and liabilities of individual possessions, they became in law and in fact the property of individual citizens, and not of a tribe or nation of Indians. They were as subject to the laws of the country and the adjudication of our territorial courts, as any other lands owned by citizens within the territory. This point was carefully investigated, and, we think, correctly decided, by our territorial supreme court in *Reid v. Webster*, Morris, 467. The opinion of the court in that case needs no additional argument to show that the laws of Iowa are properly extended over the half-breed tract.

It may also be well to observe, that in deciding this case we have attached but little force to the law of 1845, providing "for the better settlement and adjudicating of the several titles set up to the half-breed lands in the county of Lee." So far as that act is remedial in its character it

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should be enforced, but no feature in it can be considered valid and effectual which would have a tendency to destroy or even impair vested rights. Consequently any record, judgment or decree, which would have been evidence of title in the half-breed tract previous to the enactment of that law, cannot by virtue of anything it contains, detract from the conclusiveness of such evidence since its passage. In short, no statute can constitutionally derogate a vested right.*

Judgment affirmed.

Geo. C. Dixon, for plaintiff in error.

J. C. Hall and *Charles Mason*, for defendants.

* The names of the petitioners and defendants in the partition proceedings, and the shares adjudged to each as modified by the final judgment, may be useful to the many who are interested in the "half-breed tract." The following, epitomized from the record, shows the names of all the parties, and the interest to which each became entitled under the judgment.

The defendants, Marsh, Lee & Delavan forty-one shares; John Wright one fourth of a share; Cyrus Peck one eighth of a share; Samuel Abbott and Abraham Wendall one half share; William Phelps two shares; Ebenezer D. Ayres one half share; William Gillis one share; Henry McKee one share; Wilson Overall one share; Garrett V. Deniston one half share; James L. Schoolcraft one half share; Elizabeth Hunt one share; Rosella O. Gliem one share; Mary L. Murdock one share; Eliza O. Perkins one share; James L. Burtis one share; Margaret Farrar two shares; James Muir one share; Thomas Connelly one share; John C. Ward one half share; Elijah Fisher, D. W. Kilbourn and Henry S. Austin one share; Edward Kilbourn one half share; John Burtram one half share; Edwin Manning one quarter of a share; Edwin Manning and Sheldon Norton one half share; Wright, McDaniel and Darrah one share and three-fourths; Manning and Horn one share; Augustus Gonville one share; Benjamin F. Messenger one share; the heirs of Nathaniel Knapp two shares and seven-eighths; Henry Brown one eighth of a share; William, John and Dalzell Smith two and one half shares; William H. Smith two shares; John H. Lines one share; William Price one share; Charles Thompson one share; and one share reserved for Euphrosine Antaya, subject to proof.

The shares of the several petitioners are designated as follows: Josiah Spalding one share and three-eighths; Archibald Gamble one share and one-eighth; Patrick Walsh one share; Etienne Provost one half share; J. and E. Walsh two shares and seventeen one hundred and twentieths of a share; heirs of Henry K. Ortleigh two fifths of a share; Green Erskine one share and seventeen twenty-fourths of a share; Joseph Ridgway, trustee of Geo. Patch

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one third of a share; Herman C. Cole one fourth of a share; Stephen Gore one eighth of a share; John B. Sarpy one third of a share; Edmond H. McCabe one third of a share; Hugh Lunutty one share; James R. McDonald one share; Joseph W. Walsh one share; John O. Rourke one half share; Antoine Gracia and Margaret his wife one half share; Angelique La Guthrie, now Matabon, one half share; Michael Tesson one share; heirs of Otis Reynolds eleven twenty fourths of a share; Heirs of James A. H. Palmer one third of a share; Geo. H. Crozman five sixths of a share; and Antoine Le Claire six shares and three eighths of a share.

ROBERTS v. ALBRIGHT.

Replication demurrable if it does not traverse the material allegations of the plea.

A nonsuit for failing to reply to pleas, when an issue in fact is joined on another plea is erroneous.

ERROR TO HENRY DISTRICT COURT.

Opinion by WILLIAMS, C. J. This is an action on the case for a libel, commenced in the district court of Lee county. Venue changed to Henry, and trial at May term, 1847. Defendant filed his plea of general issue, and thirteen special pleas. Plaintiff demurred to each. The court sustained the demurrer to all the defendant's pleas, except numbers five, seven, and eleven. Plaintiff filed replications to said pleas. Whereupon defendant filed his demurrer to the replications. The court sustained the demurrers to replications to fifth and eleventh pleas, and overruled that to the replication to the seventh plea. The plaintiff failing to reply to the fifth and eleventh pleas, the court rendered a judgment of nonsuit.

The plaintiff in error has filed the following assignments of error: 1. The court erred in sustaining the defendant's demurrer to plaintiff's replications to fifth and eleventh pleas. 2. The court erred in rendering judgment of nonsuit against plaintiff on the entire case, while issues re-

mained on plea of general issue. The certified record is in a confused and irregular condition, so that it is with much difficulty that this court can arrange it for a satisfactory examination. The replications to the fifth and eleventh pleas we think were properly demurrable, as they were not in fact responsive; they did not directly traverse the material allegations of the pleas so as to form a perfect issue; but as the case must be reversed upon the second assignment of error, we do not deem it necessary to discuss this point at large. We will only say that the pleas were upon demurrer declared good by the court. They contravene several matters, part of which were of record, and some of fact, *dehors* the record, all of which should have been specially denied or traversed by the replications.

1. All the material allegations in the pleas should have been denied. In the case at bar, the pleas set out particular facts in answer to the declaration, and the plaintiff replies by a conclusion or inference of law. This is not allowable, as no issue of fact is thereby made for the jury.

2. It is objected that the demurrer to the replication to the seventh plea was overruled, and a judgment of nonsuit rendered against the plaintiff, while there was an issue pending on the seventh plea. This could not be legally done. The issue was for the jury, and could not have been so disposed of. Judgment for the defendant should have been entered, upon sustaining his demurrer to pleas five and eleven, upon failure of plaintiff to reply to them. But the remaining issue of fact made by plea number seven, and the replication thereto, should have been tried. *Hereford v. Crow*, 3 Scam., 425; *McAden v. Gibson*, 5 Ala., 341.

Judgment reversed.

D. Rorer and H. W. Starr, for plaintiff in error.

J. C. Hall and Geo. C. Dixon, for defendant.

ROBERTS v. MILLER.

In action for libel, where M. published that R. was a defaulter, a mortgage executed by R. to the United States, and the record of foreclosure, are admissible as evidence of R.'s indebtedness to the government. Any action by Congress or the departments of government, subsequent to the libellous publication, not admissible as rebutting evidence.

ERROR TO HENRY DISTRICT COURT.

Opinion by KINNEY, J. This was an action on the case to recover damages for the publication of a libel. Roberts in his declaration sets out that Miller, on the 30th day of July, 1844, published of and concerning the plaintiff the following false, malicious and defamatory matter, to wit: "Witness, that B. S. Roberts, at present the leader of the clique, a notorious public defaulter to a large amount," &c.

The defendant pleaded the general issue with special pleas. The cause was tried in Henry county upon change of venue, and as the pleas were lost, the plaintiff agreed that the defendant might file the plea of general issue *nunc pro tunc*, and give in evidence anything which could have been specially pleaded. With this arrangement the parties went to trial. The plaintiff gave in evidence to the jury the publication of the libel as described in the declaration.

The defendant then offered in evidence: 1. A bill of complaint filed on the part of the United States for the foreclosure of a deed of defeasance given by Roberts to the government.

2. The deed of defeasance, whereby Roberts, as late lieutenant in the army of the United States, and assistant commissary and acting assistant quarter-master, mortgaged to the government certain "half-breed lands," on the 10th of April, 1839.

3. The answer of Roberts, which admitted the charges in the bill.

4. The transcript of a decree in the district court of Lee county, by which it appears that a decree upon the mortgage for \$4699.12, was rendered in favor of the government against Roberts, and that the equity of redemption to the mortgage property was foreclosed.

The defendant also offered in evidence a deed from Roberts to Akin and others, dated 5th May 1837, (prior to the execution of the mortgage,) conveying to them the premises described in the mortgage to the government.

This evidence was allowed by the court to be read to the jury; whereupon the plaintiff filed his first bill of exceptions.

The plaintiff then offered in evidence certain documents emanating from the departments at Washington, including letters from distinguished individuals, recommending to the President the restoration of Roberts to the army. Among them is a report from the judiciary committee of the Senate and House of Representatives, dated in 1845, reporting a bill for the relief of Roberts, and also asking for his restoration to his former rank in the army as an act of justice. This report of the committee is based upon the fact that at the time the specie circular of 1836 went into operation, Roberts, as a disbursing officer, had a large amount of bank notes in his possession, upon a bank which suspended specie payment, and therefore they were unavailable funds. The committee say, upon a thorough examination of all the circumstances in the case, they came to the conclusion that Mr Roberts had been guilty of no acts impeaching his honor and integrity as an officer, and that his official acts aimed at the good of the service, and the faithful application of the public funds in his hands, &c. This report is signed by the committee, and concurred in by senators Walker and Dix.

The plaintiff also offered in evidence a document from the treasury department, purporting to be a settlement of the account of Roberts as lieutenant, &c., during the years 1836-7-8 and 9, in which Roberts is charged with \$424.82, and credited with a like sum. All of these docu-

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ments, report, certificates, letters, &c., were offered conjointly and separately, but they were all excluded from the jury, which forms the basis for the plaintiff's second bill of exceptions.

A verdict was rendered in favor of the defendant, and the plaintiff in error assigns the ruling of the court permitting the evidence to go to the jury as set out in his first bill of exceptions, and the exclusion of the evidence offered by him in his second bill, for error.

We think the evidence offered by the defendant was properly admitted. By the latitude extended to him by the plaintiff, such evidence could not well be excluded from the consideration of the jury. Under a special plea it would have been competent for the defendant to introduce evidence tending to show the defalcation, and thus justify the publication. The bill, answer, mortgage and decree, were matters of public record, and these were at least *prima facie* evidence of the indebtedness to the government. They upon their face show that the indebtedness accrued in a fiduciary capacity. The mortgage is given by Roberts as late lieutenant in the army, and assistant commissary and quarter-master. The capacity in which Roberts stood indebted to the government fully appeared. This was notorious, it was of record, fully admitted and confessed by the answer of Roberts. The deed to Akin and others was proper evidence, as the indebtedness might be presumed to be secured by the mortgage. But this shows that the land was not liable to mortgage, Roberts having previously conveyed the same by deed to Akin; consequently at the time of the publication as appeared from the records taken together, Roberts in his official character still appeared to be a government debtor to a large amount; therefore in this ruling of the court there is no error.

The plaintiff, as rebutting evidence, offered the report, letters and documents before referred to, none of which we think could have been permitted to be read to the jury. The report of the judiciary committee bears date in 1845,

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subsequent to the date of the mortgage, the decree and the publication of Miller. Miller relies as a justification upon the public records of the county showing the deficit, and any action that Congress may have taken after the publication could not be introduced as evidence to defeat a plea of justification predicated upon the record as showing a prior deficit or defalcation.

The document purporting to have been a settlement, includes the years 1836-7-8 and 9. We cannot see how this can explain or rebut the presumption of defalcation, as made by Roberts's own confession in 1844, and which at the time the alleged libellous matter was published, was a matter of evidence against Roberts upon the record. The other documentary evidence offered, referred to in the bill of exceptions, does not require comment. It is not necessary to adduce reasons in support of a decision, the correctness of which cannot well be questioned.

Judgment affirmed.

D. Rorer, for plaintiff in error.

J. C. Hall and *Geo. C. Dixon*, for defendant.



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Where the transcript of a justice does not set forth the judgment in *hæc verba*, but contains sufficient to show its character, its amount and against whom it was rendered, it is sufficient to give the court jurisdiction.

A judgment will not be reversed for a mere diminution of the record which might have been perfected.

One of two joint obligors not liable in a proceeding of garnishment.

Judgment cannot be rendered against a garnishee upon his liability before it becomes due.

Garnishee under no greater liability to his garnishor, than he would be to his creditor.

A garnishee holding a note for collection, is not liable as holder of the note,

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nor on the receipt he gave for the note, without a previous demand and a refusal to deliver up the note, and the amount collected on the note.

Judgment cannot be rendered against garnishee unless he acknowledge an indebtedness.

A judgment taken to the district court by writ of *certiorari* may be reversed.

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. Perry Wilson & Co. obtained a judgment against Samuel S. White, before a justice of the peace, on which execution was issued, with a garnishee clause, against William G. Albright. On the return day, March 10, 1847, Albright appeared before the justice, and in reply to interrogatories answered in substance, that he had no goods, money or effects belonging to the defendant in his possession or under his control; but that on the 1st day of April 1845, J. W. and W. G. Albright gave their note to S. S. White or order for \$225, payable in two years after date; that said White, before leaving the country, deposited the note with him, and took his receipt for the same; and that the note is still in his possession. Upon this answer alone, it appears that the justice rendered judgment against W. G. Albright as garnishee; but on being brought to the district court by *certiorari*, this judgment was reversed.

1. It is urged for the plaintiffs in error, that the district court erred in reversing the judgment of the justice, as it did not appear by his returns to the *certiorari* what that judgment was. It is true that the specific form of the judgment is not set forth by the returns of the justice *in hæc verba*, but still sufficient is contained in the affidavit, writ and returns, to leave no doubt that judgment was rendered by the justice against the garnishee for the sum of \$43, the amount of the judgment against S. S. White in favor of Perry Wilson & Co. This was sufficient to give the court jurisdiction. Besides the necessary legal presumption that the court below had before it the proceedings of the justice, and all the material facts in due form, upon which to predicate an enlightened decision, it appears by the bill of exceptions, that the papers on file in the case

with the facts as they appeared of record, were submitted to the consideration of the court, and upon these the judgment of reversal was rendered. It has repeatedly been decided by this court, that a judgment cannot be reversed by reason of any diminution in the transcript of the record. If defective, the plaintiff should have it perfected; and if it be not perfected, the correctness of the proceedings below must necessarily be presumed.

2. The second assignment claims that the court erred in reversing the judgment of the justice, because the answers of the garnishee show that he was liable.

The decision of the district court was doubtless mainly predicated on the facts: 1. That the note given by J. W. and W. G. Albright was a joint obligation, not due, nor in the possession of the payee, at the time judgment was rendered against W. G. Albright, one of the joint makers. It is conceded that one of two joint obligors cannot be held liable in a proceeding of garnishment, on an indebtedness exclusively joint. 2. The note was not due. It is clear that to justify such a judgment, there must have been an actual pending indebtedness from the garnishee to the execution defendant, and not merely a liability to pay at some future day. The language of the statute is, "That if any such garnishee shall be found to be indebted to the defendant in any such execution, a judgment shall be rendered against such garnishee for the amount for which he admits himself indebted in his said answer, or so much thereof as will satisfy any such execution." This is explicit, and leaves no room to doubt that a judgment cannot legally be rendered against a garnishee on a liability not due. It has been decided by our territorial supreme court, that the maker of a negotiable instrument cannot be made liable on a garnishee process unless the instrument is due, and shown to be in possession of the execution defendant. *Jefferson County v. Fox et al.*, Morris, 48. A decision so conformable to justice and the true meaning of the statute, cannot be disturbed. It would appear repugnant even to the weakest conception of right, to place a garnishee under

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greater liabilities to the garnishor than he would be under to his creditor.

But plaintiff's counsel contends that the garnishee in this case was liable as holder of the note, and on the receipt he gave when the note was placed in his possession. Giving a receipt for a note deposited with him for safe keeping, or for collection, could not of itself create a pending indebtedness, nor render him liable as garnishee. Independent of the consideration that White's beneficial interest in the receipt may have been transferred, we must conclude that if Albright was not liable in an action to White on the receipt, without previous demand and refusal to deliver up the note, or the amount collected thereon, he certainly could not be held amenable as garnishee.

Again, it is urged that the note should be regarded as property or effects of White in the hands of Albright. But even admitting it in that light, the proceedings of the justice appear equally objectionable. Under the 7th article, and 10th section of the justice's act, a judgment can be rendered against the garnishee for such amount only as he may acknowledge himself indebted. And in the attachment clause of the same act, article 9, § 19, it is provided, that issues between the plaintiff and garnishee shall be tried as ordinary issues between plaintiff and defendant; and if on the trial of any such issue, property or effects shall be found in the hands of the garnishee, the justice or jury shall assess the value thereof, and the judgment shall be for the amount in money. Though this section is arranged under the article headed "*attachment*," its provisions appear to extend generally to proceedings of garnishment, and a judgment for property or effects in the hands of a garnishee can be rendered only in conformity to its provisions. Judgment cannot be rendered against a garnishee, unless he acknowledge indebtedness. Rev. Stat., 331, § 10.

3. It is assigned as error, that the court rendered a judgment of reversal on a writ of *certiorari*, where judgment should have been according to the very right of the cause.

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either for the plaintiff or defendant. We cannot believe that this objection is urged with much seriousness. Though the statute requires the district court in such cases to give judgment as the right of the matter may appear, it also provides that the judgment may be affirmed or reversed, in whole or in part. But even if limited to the "very right of the matter," such right would often require an unqualified reversal or affirmance.

No sufficient reason appears for disturbing the judgment of the district court in this case.

Judgment affirmed.

L. R. Reeves, for plaintiff in error.

D. F. Miller, for defendant.



RIFE v. PIERSON.

Where the transcript of a justice describes a note to be dated April 12, when the note offered in evidence is dated April 2, but is otherwise identified as the note upon which suit was brought, the variance is not fatal.

ERROR TO DES MOINES DISTRICT COURT.

Opinion by WILLIAMS, C. J. John Pierson sued Abraham Rife in debt before a justice of the peace. His action was brought on two due bills, the one dated the 2d of April 1846, and calling for \$50 with 10 per cent. interest, and a credit endorsed thereon for \$3. Judgment was entered by default for the plaintiff for \$90.95 and costs. The defendant took an appeal to the district court of Des Moines county, and the plaintiff recovered a judgment against defendant, and Rodney Arnold, his bail, on the appeal, in accordance with the statute, for the sum of \$94.96 damages with costs.

The bill of exceptions shows, that on the trial in the district court, the plaintiff offered in evidence a due bill drawn in his favor by the defendant, on the back of which were endorsed the words and figures, "Filed Nov. 3, '47, A. Ingraham, J. P." The defendant's counsel objected to the note going in evidence to the jury, on the ground that it was not the same note which was before the justice before whom the suit was instituted and tried originally. That therefore it was a new and different "cause of action" which was not tried there. The only variance relied on to support the objection is found by reference to the date of the instrument, and the description entry thereof, made by the justice in his transcript. The note bears date the "2d of April 1846," whereas the transcript describes it as of the date of "April 12, 1846." In all other respects it is correctly described. Is this a fatal variance? We think, as the case is presented, it is not. It is true it is required by Rev. Stat., 335, § 15, that the "same cause of action" only could be sustained and tried by the district court on the appeal. But, in a proceeding of this kind, will it be contended that the district court is bound, with strict and rigid precision, to confine itself to the transcript of the justice alone, to ascertain whether the instrument offered in evidence to support the plaintiff's action be the same which was filed with the justice at the commencement, as "the cause of action?" If so, a single clerical mistake of the justice, who may not be very apt in describing with minuteness an instrument of writing of this kind, may operate to defeat the obvious design of the statute, which saves the case of a party upon appeal from defeat, for "errors, defects or imperfection in the proceedings of the justice." Rev. Stat., 335, § 7.

The due bill itself is sent up with the transcript among the papers of the case, and is endorsed, "Filed Nov. 3, 1847"—which endorsement is signed by the justice in his official capacity. The sum of money called for, the rate of interest, the month and year, are all correctly stated in the transcript.

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In actions before justices of the peace, the plaintiff is not required to file a declaration, so that the rules of practice in relation to variance between the allegations in the declaration and the evidence offered, will not apply. The record of the justice is not to be taken as the plaintiff's declaration in the case. The instrument showing indebtedness is instead of a declaration, and when filed in the case is a component part of the record. It comes up with the record, authenticated in the same way that the transcript and other proceedings are, by the attestation of the justice. Coming in this way into the district court, and being an authenticated part of the case with the proceedings, we think it bears its own mark of identity; and it must be taken as the instrument upon which the suit was brought originally before the justice. We consider the variance a mere mistake of the justice, in describing the instrument in his transcript, which is sufficiently apparent under the circumstances, and that it is cured by the statute.

The argument that the defendant may be sued again, and that a former recovery could not be shown in defence, is answered by the fact that the instrument is of record in this case by the filing under attestation, and will so remain.

Judgment affirmed.

D. Rorer, for plaintiff in error.

Grimes and Starr, for defendant.



AUSTIN & SPICER v. CARPENTER *et al.*

Equity will afford relief to those who are indirectly injured by official fraud or misconduct, as well as to those who are directly injured by such fraud. The rule that a judgment will not be reversed where the error does not affirmatively appear of record, applies to cases at law, and not to appeals in chancery.

IN EQUITY. APPEAL FROM DES MOINES DISTRICT COURT.

Opinion by KINNEY, J. It appears from the record in this case, that the appellants, Austin & Spicer, in the fall of 1845, commenced a suit against one Edwin Wilcox; that they sued out an attachment, and that Postlewait, Coolbaugh & Garrett became sureties in the attachment bond. Judgment was afterwards rendered in favor of complainants against said Wilcox. The goods attached were sold upon execution, Francis J. C. Peasley being the purchaser, and he was ordered by the court to pay the costs that had accrued upon said suit out of the proceeds of said sale.

In February 1848, Wilcox, for the use of Anthony W. Carpenter, commenced a suit before James R. Fayerweather, a justice of the peace, against the said Postlewait, Coolbaugh & Garrett for the costs in the attachment suit, and recovered judgment.

A bill in chancery was then filed, enjoining said Carpenter, Fayerweather, and Harris, the constable, from the collection of said judgment.

In the district court the bill was demurred to, the demurrer sustained, the injunction dissolved, and the bill dismissed.

The complainants appeal to this court, and assign for error this ruling of the court.

The demurrer having admitted the facts set forth and charged in the bill, which were well pleaded, to be true, we have only to examine the bill to ascertain whether it exhibits such a case as will entitle the complainants to the interference and aid of a court of equity.

It was urged by counsel for the appellees in the argument, that the court would not look into the merits of the case, as, by the chancery act, the court were compelled to dismiss the bill, for the reason that the complainants did not appear and prosecute the suit. This position is not

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sustained by the record, which shows that the cause came up to be heard upon the defendant's demurrer to the complainants' bill, whereupon all and singular, the premises being seen and heard, &c., the injunction was dissolved and the bill dismissed. It is conclusive, from the record, that the bill was tried upon the demurrer and dismissed for the want of equity, and not *pro forma*, as was urged in the argument.

Looking into the bill, we find that it sets forth in substance that the attachment against Wilcox was sustained; that the sureties thereby became absolved from the payment of costs upon their bond; and that Peasley was ordered to pay all costs which accrued in said suit.

The bill also states, that when the suit for the collection of costs against said sureties was about to be tried, the counsel for complainants appeared in order to defend, but said Justice Fayerweather refused to let him do so; that said sureties did not appear, expecting said Austin & Spicer to do so, and defend said suit. The complainants also state, that the case would have been appealed had not the justice informed their attorney that the same was settled, and would not be pursued. Fraud is charged in the rendition of the judgment, and it is charged that the justice acted contrary to good faith, &c.

It is not necessary for this court, sitting in chancery, to decide whether the defendants before the justice had a good defence at law, nor does it become material in the view in which this case is presented to our minds. But it is proper to ascertain whether Austin & Spicer had a right to appear and defend the suit, and whether they were improperly deprived of their appearance and defence by the misconduct of the justice. The defendants before the justice, although the *real* parties, were only nominally so in interest, as they would have their action over against the principals in the bond for any judgment that might be recovered against them.

Although the appellants were not party defendants, yet it became important for them to protect their sureties from

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any judgment, and thus preserve themselves from a liability which would necessarily result in favor of the sureties if judgment were rendered against them; and we see no impropriety in their conducting the defence, particularly as the sureties did not defend, expecting that the counsel for Austin & Spicer would do so. But the justice appears to have been *unnecessarily* technical, and to have shut out the defence, from honest motives we would presume, if it were not otherwise charged in the bill.

If the bill did not state that the defence was left to the appellants, or in language which is equivalent to it, we might come to a different conclusion; for, as a general rule, the parties only to a suit have the right to defend. But the justice not only prevented them from defending, but, after judgment was rendered and an appeal applied for, informed the counsel that the case was settled, and would not be pursued, thus depriving them of the benefit of an appeal, as the execution upon the judgment was retained until after the time for appeal had expired. If such conduct as this in a public officer, acting in an official capacity, in violation of the rights of parties, is not a fraud, it would be difficult to conceive of a case in which official malfeazance could be construed into fraud. The principle of law is well settled, that not only the parties directly in interest may be relieved from this kind of fraud, but a court of equity will afford relief to parties who are indirectly made to suffer by such official misconduct. 2 Am. Chy. Dig., 16, 19, 24.

But it was contended by counsel for the appellees, that if there was error in the district court in dismissing the bill, the judgment should not be reversed unless the error appears affirmatively upon the record. This is the law when applied to cases upon writs of error, as has been frequently decided by this court. *Mackemer v. Benner*, 1 G. Greene, 157; *Saum v. Jones Co. Com.*, *ib.*, 165; *Hemp-hill v. Salladay*, *ib.*, 301.

But this doctrine does not obtain when applied to appeals in chancery. On appeal, a court of equity, freed

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from those rigid rules which limit and confine a court of errors, having acquired jurisdiction, will examine into the merits of the case for the purpose of administering justice, guided only by the universal principles of equity jurisprudence. Not confined to errors apparent, the court will correct errors of conscience, which sometimes are of such a nature that they cannot be spread upon the record. All appeals in chancery must be tried *de novo*, the same as if this court had original jurisdiction, regardless of the decision of the court below, except so far as necessary to a correct understanding of the record and the matters at issue.

From a careful examination of the matters presented in this case, we are of the opinion that the bill exhibits a strong case for equity interference, and that the court below erred in sustaining the demurrer to the complainants' bill.

The decree is reversed, and the case remanded to the court below, for further proceedings not inconsistent with this opinion.

Decree reversed.

J. C. Hall, for appellants.

D. Rorer, for appellees.



LYNE *et al.* v. HOYLE *et al.*

Application for a change of venue may be made to a justice of the peace at any time after the appearance of parties and before the jury is sworn, or the trial submitted to the justice.

Statutes made to promote an impartial administration of justice should receive a liberal construction.

Lyne v. Hoyle.

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. Application was made to the justice of the peace before whom this suit was commenced for a change of venue. The change was refused, on the ground that the affidavit for it was made after a continuance of the cause, and after the return day of the writ. But it appears to have been made before the jury was sworn or the trial submitted to the justice. Judgment having been rendered against the defendant, he took the case to the district court by writ of *certiorari*, to determine the correctness of the decision by which his application for a change of venue was overruled. In the district court the judgment of the justice was affirmed.

The section of the statute about which the question of construction is raised provided, that "if, upon the appearance of the parties on the return of process in any case, either party shall, before the jury is sworn or the trial submitted to the justice, make affidavit," &c. Rev. Stat., 327, § 6. It is urged that this language limits the time of filing the affidavit for a change of venue to the return day of the process, and that a party cannot avail himself of it at any future day, or after a continuance of the cause. To this construction, however, we cannot give concurrence. The letter of the statute clearly imports a term within two designated periods of time, during which a party may avail himself of this important legal right. This term commences "upon the appearance of the parties," after or "on the return of process," and terminates as soon as "the jury is sworn or the trial is submitted to the justice." This construction, we think, must necessarily follow as the manifest spirit of the law and the apparent intention of the legislature. Statutes made to promote an impartial administration of justice should receive a liberal construction, a construction that will not limit or impair its remedial object. *Steamboat "Kentucky" v. Brooks et al.*, 1 G. Greene, 398. As in this case the jury had not been sworn,

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nor the trial submitted to the justice, when the defendant made application for a change of venue, it should not have been refused, and the district court erred in affirming the decision.

Judgment reversed

J. C. Hall, for plaintiff in error.

Geo. C. Dixon, for defendants.



HAMPTON, *ex parte*.

No person but the party in whose favor a judgment is rendered, his agent or attorney of record, can control or order process to enforce the judgment. Officers of court, or witnesses to whom fees are due, have not the power to order execution on a judgment owned by another.

Opinion by WILLIAMS, C. J. In the matter of the motion of George S. Hampton, to rescind the order entered at this term, relative to certain executions issued by him as clerk of the 4th supreme court district, to the sheriff of Des Moines county, for costs.

The costs, for which the executions have been issued, accrued upon causes which were pending in the supreme court of this state, previous to the enactment of the law dividing the state into districts.

Upon the passage of the law creating four supreme court districts, the attorneys of the parties to the several suits made an agreement in writing, that certain cases therein named should be transferred from the docket at Iowa city to that of the first district at Burlington, to be tried; and that in all those cases the costs should be paid by the losing party upon final judgment.

In order to the removal of the causes, the writ of error in each case was dismissed from the 4th district at Iowa

Hampton, *ex parte*.

city, and the papers withdrawn according to the agreement; and they were regularly entered, without prejudice to the parties, on the docket of the 1st district at Burlington, there to be tried.

Such being the facts, and the causes being for trial and final disposal, the clerk of the supreme court for the 4th district, on his own motion, issued execution in each of these cases for his fees, judgment being entered for the costs on the dismissal of the writs in that district.

The supreme court being in session in the 1st district, the attorneys in these cases appeared in court, and having directed the sheriff to return the executions to the clerk of the 4th district, whence they came, procured an order from this court, directing the clerk of the 4th district to make out and send to the clerk of the 1st district, a fee bill in each case, in order to the collection and payment of the fees in accordance with the practice in this state.

The motion now to be considered, is to rescind that order, so that executions may be allowed to issue as before.

The question is, whether the attorneys for the parties to a suit have the power to control the cause until finally disposed of in the court, without interference on the part of the clerk, or other persons who may be entitled to fees.

In conducting a cause in any of the courts of this state, before or after judgment, no person can be recognized as being authorized to control the case but the party, his agent, or attorney of record.

It not unfrequently happens that the parties, plaintiff and defendant, in the exercise of right, and in the spirit of justice and compromise, agree upon terms by which the stern and rigorous proceeding of the law is stayed, and time and opportunity afforded for the defeated party to satisfy the demands of the law, with the consent of his successful antagonist. Courts will not prevent the parties from acting with conciliation and forbearance, promotive of convenience.

To allow the officers of the court, or witnesses, to whom fees may be due, to step in and control the cause, either

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before or after judgment, by ordering process to issue, would be a manifest privation of the rights of the parties.

A judgment when entered is subject to the control of the party in whose favor it is. He, his agent or attorney, may, in the use of the proper process of the law, enforce it, and no other person. It is his judgment.

If fees be due to the officers of the courts, or witnesses, and they are unreasonably delayed in their collection by the parties to the proceeding, the law gives them a remedy for services rendered. They may enforce their rights by proceeding against the party liable.

In these cases, the attorneys acted in the exercise of rightful and legal power, by staying the executions and ordering their return. The causes in which the fees have accrued being now in this court, by agreement of the attorneys for the parties, which makes provision for the payment of those fees as far as the parties are concerned, the fees which are due upon the docket at Iowa city will be sent to the office of the clerk of this district, to be made part of the record in the cases to which they may appertain, subject to such further proceeding as may be proper for the parties interested.

Motion refused.

Geo. S. Hampton, pro se.

J. C. Hall, contra.



LLOYD v. McCLURE.

Where a verdict has been returned on matters of account, a new trial should not be granted, unless it is apparent that manifest injustice has been done.

A new trial should be granted, if the verdict is contrary to law, and the instructions of the court.

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Unless the contrary appears, it will be presumed that the court exercised a sound discretion in overruling a motion for a new trial.

Where a party enters credits upon the instrument sued on, it is not necessary for the defendant to prove them.

Affidavits of jurors not admissible to explain their verdict.

ERROR TO DES MOINES DISTRICT COURT.

Opinion by KINNEY, J. McClure sued Lloyd before a justice of the peace, upon an account amounting to \$67.43, upon which he had given Lloyd a credit of \$18.67.

McClure recovered a verdict before the jury for \$45.76. Lloyd appealed to the district court of Lee county, from which he obtained a change of venue to Des Moines, where the cause was tried, and a verdict rendered in favor of McClure for \$25.25. Lloyd filed his motion for a new trial, which was overruled by the court. This ruling is assigned for error. A bill of exceptions embodying all the testimony was taken by the plaintiff in error, from which it is contended that the verdict of the jury was not authorized by the testimony submitted, and hence the court should have granted a new trial.

When matters of account are submitted to a jury, and a verdict rendered, judges should not disturb the verdict, unless it is apparent that manifest injustice has been done. By the wise policy of our laws, the jury are made the exclusive judges of all the facts, and if by their verdict they misapply the facts, or err in their conclusions, it should be such an error as to produce irresistible conviction upon the mind of the court that the verdict is not the result of a free, sound, and unbiased exercise of judgment upon the testimony submitted, and that manifest injustice will result from a judgment upon the verdict, before the judge should interfere by putting the parties again to the expense and trouble of another trial. While this is true in relation to those cases involving merely matters of fact, inde-

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pendent of legal questions, it is equally true that courts should not hesitate to grant new trials when the verdict is contrary to law and the instructions of the court upon the law of the case. But even in such cases the court will not grant a new trial, unless the verdict will operate injuriously upon the party applying.

But in the case before us, the motion was predicated upon the ground that there was not sufficient testimony to support the verdict. Unless the contrary appears, we must presume that the court exercised a sound discretion in refusing the motion for a new trial. This court cannot take the place of a jury, and weigh the testimony, and decide that the preponderance is in favor of the plaintiff in error. If the court below erred upon a motion addressed to its sound discretion, in which was not involved any question of law, it may well be questioned whether this court, as a court for the correction of errors at law, can reverse on that account. At common law, the decision of a court upon an application addressed to its sound discretion, cannot be assigned for error. In the case of *Cook v. The United States*, 1 G. Greene, 56, this court say: "To give the court jurisdiction of a cause on writ of error, the basis of the error being the decision of the court, upon a motion for a new trial, it must appear affirmatively upon the record that the motion was based and decided upon some legal point contained in the motion for a new trial." This appears to be in accordance with the decisions in Illinois, before the common law was changed by statute. *Smith v. Shultz*, 1 Scam., 491.

But it was urged in the argument, that the jury did not allow Lloyd the credits that were given by McClure upon his bill of particulars. When a party enters credits upon the instrument sued on, whether it be a note or on account, the opposite party is not obliged to prove them. They stand admitted or confessed, and it would be a hardship upon the defendant, resting securely in the belief that testimony would not be necessary to prove the credits, if upon trial they were excluded. A party has a right to

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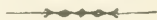
presume it is not necessary to prove that which is admitted by written credits upon a paper, which constitutes the evidence of the plaintiff's right of action.

In this case the affidavits of the jurors were introduced in explanation of their verdict, and in relation to what items they had allowed, and what rejected. Jurors are not permitted in this manner to explain or justify a verdict. When their verdict has been attacked, they have in some instances been permitted to introduce affidavits in support of their verdict; but according to the settled doctrine, for no other purpose. These affidavits having been properly rejected by the court, there was not any evidence showing that the credits of Lloyd on McClure's bill were not allowed by the jury, and the presumption must be, that they were allowed and taken into consideration by them in making up their verdict. After having been entered by McClure, they were admitted and confessed, as much so as if he had orally acknowledged before the jury that they were correct items of set-off. It would certainly be a most violent presumption to suppose that they were not allowed to Lloyd by the jury, and that they did not constitute a part of their verdict.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

M. D. Browning, for defendant.



WRIGHT v. HUGHES *et al.*

The time of suing out a writ of error is determined by the date of its service upon the clerk to whom it is directed.

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. A motion is made in this case to dismiss the writ of error, on the ground that it was not

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sued out within three years after the rendition of the judgment, as limited by statute.

The record shows that the judgment was rendered October 24, 1845. The writ of error appears to have been first dated on the 1st day of "Nov." 1848, but the word "Nov." is partly erased and October inserted. On the 22d of November the writ was filed with the clerk of the district court.

In support of the motion, it is urged that the only authentic evidence of the time of suing out a writ of error is the date of its service upon the clerk of the district court to whom it is directed.

As the clerk of the supreme court is authorized by law to issue blank writs of error to any attorney of the court, to fill up as occasion may require, and as they are subject to be antedated to suit particular cases, the law limiting the time for suing out writs of error to three years from the date of the judgment, might be grossly evaded by taking the date of the writ as a reliable test of the time it was sued out. If writs of error were dated and filled up by the officer issuing them, as is usual with other writs, their date would be regarded as evidence of the time they were really sued out. But under our practice, in order to prevent an abuse of the law in that particular, we deem it the safest rule to be guided by the date the writ was served upon, or filed by the clerk of the district court, to whom it is directed.

The writ of error in the present case, **not having been** sued out in time, the motion to dismiss is granted.

Motion granted.

***J. C. Hall*, for plaintiff in error.**

***H. T. Reid*, for defendants.**

Millard v. Singer.

MILLARD v. SINGER.

A new trial should not be granted on the ground of newly discovered evidence, unless it is of a character calculated to produce a substantial change in the verdict; nor when such evidence, by ordinary diligence, might have been produced on the trial.

A motion for a new trial is addressed to the sound discretion of the court, and should be refused unless a strong meritorious case is shown.

ERROR TO LEE DISTRICT COURT.

Opinion by WILLIAMS, C. J. This is an action of assumpsit, commenced before a justice of the peace in Lee county. Justin Millard, the plaintiff, sued Henry Singer, the defendant, for services rendered, as a physician, to Elizabeth Conkle. The suit was brought against the defendant, charging him, as husband of the said Elizabeth, with the indebtedness created when she was a *feme sole*. The cause was taken to the district court of Lee county by appeal.

Upon the trial below, evidence was given for the purpose of showing that Elizabeth was a *feme sole* at the time the services were rendered. That she was then acting without the control of her father, and was of such an age as rendered her liable in law for debts contracted by her. The evidence being closed, the cause was submitted to the jury, and a verdict was rendered for the defendant. A motion was made for a new trial, and overruled by the court.

The bill of exceptions taken in the case presents the question for adjudication upon the following assignments of error:

1. The court erred in refusing to grant a new trial.
2. The court erred in the instructions given to the jury.

The bill of exceptions shows that evidence was given to the jury tending to prove plaintiff's account for services, as physician, rendered to Elizabeth Conkle, (now charged as the wife of Singer,) the defendant, while she was *feme*

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sole, and resided with her father, Henry Conkle, and that such services were necessary; also that she was not a minor at the time the services were rendered, that she acted for herself, received her own wages, paid her own expenses, &c. The items charged were admitted to be correct.

Henry Conkle, the father of Elizabeth, was called as a witness, and proved, among other things, that the services charged in the plaintiff's account were rendered to his daughter while she was a member of his family, and under age, in July, 1846.

Evidence was also given to the jury that wages had been paid to Elizabeth before her alleged marriage with Singer, for work done by her, &c.

The jury having rendered their verdict for the defendant, a motion was made for a new trial. This motion, together with the instructions of the court, is made a part of the bill of exceptions.

The instructions which were given by the court to the jury are assigned for error. The assignment does not specify any particular error, so as to inform this court in what it consists. But we are left to examine and discuss the instructions *in extenso*, as they appear of record in the case, to ascertain for the plaintiff in error whether something may not be found upon which to maintain the assignment. As several questions are decided by the court touching the case, as appears by the instructions, it may be justly presumed that the plaintiff in error must have known the error, if there is any, upon which he relied for a reversal of the case. If he knew it, he should have shown it to this court specifically, that it might be particularly considered and decision had upon it.

It is, however, enough for us to say, that we have examined carefully the instructions of the court below, and find no error in them.

The other error assigned is the refusal of the court below to grant a new trial. In support of this motion, several positions are taken and presented, which could not be properly urged to the court, as they relate to matter of

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evidence, which was for the jury alone. The only point which we will consider is that of newly discovered evidence. It appears by the affidavit of Millard, the plaintiff, which alleges that after the trial of the cause in the district court, he discovered witnesses by whose testimony he could prove that Elizabeth Conkle, (now Elizabeth Singer,) was, at the time the indebtedness accrued, of age, so as to enable her to make a contract, and that she acted as a *feme sole*, without the control of her parents.

The affidavits of the persons by whom he proposed, on the trial anew, if granted, to prove these facts, were also read to the court and appear of record in the case. One of them proved, that in 1846, he went to the house of Henry Conkle, the father of Elizabeth, and asked her parents whether they could let him have her to work for him; that they told him that she was her own mistress, and could do as she pleased; that he hired her and paid her, and not her parents; that her parents did not claim her earnings; that her father stated that he was poor, and could not clothe her as a young lady required.

The other swore that after the trial of this cause in the court below, he went to the residence of Henry Conkle and examined the family record, and found the birth of Elizabeth recorded as follows, viz.: "July 26th, 1827, my Elizabeth was born."

The testimony of the first witness can only be viewed as cumulative to that which was given to the jury upon the trial. It presents nothing which would be decisive of the issue between the parties. In order to operate successfully upon the mind of the judge who tried the cause below, so as to call forth the exercise of a sound legal discretion in granting a new trial, the newly discovered evidence should be of a character calculated to produce a verdict different in substance from that which has already been rendered.

As to the evidence of the second affidavit, the affidavit itself shows that soon *after* the trial and verdict, he went to the house of Conkle, the father of Elizabeth, and examined

the family record, &c. This evidence, if in the exercise of due diligence the party had used the proper means to procure it, might have tended strongly to contradict the testimony of Henry Conkle, the father. But why was it not produced on the trial? It might have been as easily procured before the trial as after it, had the plaintiff exercised ordinary diligence in preparing for the trial. It was within his power to procure it, and he should have done so. If courts would allow a party thus to neglect the necessary means of making out his case, at the proper time, and then, upon a showing, after verdict against him, he could produce evidence which would give him a new trial, there would be no end to litigation. The party claiming a new trial must not only show the court that he has discovered new and material testimony which, upon the issue tried, would have produced a different verdict, and one more favorable to him; but he must by evidence satisfy that court that such testimony was not wanting, on the trial, in consequence of his own negligence. He must show due diligence to procure it on his part. If by due diligence he might have discovered the evidence before the trial, a new trial will not be granted. *Coe v. Givan*, 1 Blackf., 367; *Schlenker v. Risley*, 3 Scam., 486.

We have heretofore decided that a motion for a new trial, being addressed to the sound discretion of the court which tried the cause upon its merits, the party making it must make out a strong meritorious case, or it will be refused. *Vide Lloyd v. McClure*,* tried at this term, and cases there cited. *Wheeler v. Shields*, 2 Scam., 351; *Wickersham v. The People*, 1 Scam., 130.

We are of the opinion that in overruling the motion for a new trial, the court was not in error.

Judgment affirmed.

L. R. Reeves, for plaintiff in error.

J. C. Hall, for defendant.

* Ante, 139.

CUDDELBACK *et al.* v. PARKS.

In an action of forcible entry and detainer, an appeal bond is necessary as a condition precedent to an appeal.

An instrument with all the other requisites of a bond, is not one, unless signed and sealed by the parties making it.

A recognizance cannot, after an appeal, be converted into a bond by amendment.

ERROR TO LEE DISTRICT COURT.

Opinion by KINNEY, J. This was an action of forcible entry and detainer, brought before a justice of the peace, in which the defendant in error recovered judgment. The plaintiff's in error having appealed the case to the district court, the appeal was dismissed for the reason that the appellants had not filed a bond as was required by the statute.

The ruling of the court that the plaintiff's in error could not amend, and the dismissal of the appeal, is the alleged error.

The instrument purporting to be a bond is in due form, except that it is not under seal, and for this reason the court rejected it. Was this error?

From the peculiar character and phraseology of our statute in relation to proceedings before justices of the peace, we sometimes find difficulty in giving a construction to its various provisions which will harmonize with each other, and at the same time preserve the intention of the legislature. While the legislature in many cases have attempted to protect the judicial proceedings of justices of the peace from attacks for the want of form and technical compliance, it often becomes a serious question to ascertain how far the liberality of legislation upon this subject will sustain these officers in their official blunders.

But in view of all the indulgent statutes that have been passed, for the purpose of sheltering justices of the peace from the errors which the legislature very properly presumed they would commit, still cases will arise in which

the statute cannot be successfully brought to the rescue. While all these errors for which the statute has provided should receive the favorable consideration of the court, the courts cannot disregard those material ones for which the statute has not afforded a remedy.

The statute in relation to forcible entry and detainer, contains provisions peculiar to itself, and the proceedings under it are governed by its own requirements, dissimilar in many respects to other proceedings before justices of the peace. It provides, "that when an appeal is prayed for, as a *condition precedent* to granting the same, the justice shall require such party to enter into *bond*, with sufficient security, to be approved by said justice." Rev. Stat., 350, § 32. The appeal must be prayed for on the day of trial, and bond must be given within ten days after trial, &c.

Giving a bond by the party appealing is made, by the express language of the statute, a condition precedent to the allowance of the appeal by the justice of the peace; and unless the bond is given, the party is no more entitled to the appeal, than if a bond is tendered after the expiration of the ten days allowed by statute.

The legislature have provided that the party appealing in other cases before justices of the peace shall enter into recognizance, but they have seen proper to require, in actions of forcible entry and detainer, a bond, and in positive terms have prevented the allowance of the appeal unless the bond shall have been first given. The statute, from the peculiar nature of the action, is not only much more stringent, but entirely distinct from the one in relation to ordinary cases before justices of the peace. Was the instrument filed in this case a bond in contemplation of law? Although it may have possessed all other requisites of a bond, it was not one, unless signed and sealed by the parties making it. In the case of the *Steamboat "Lake of the Woods" v. Shaw*,* this court say, that when the legis-

* Ante, page 91.

lature use the word bond, we will presume they mean an instrument under seal. This question underwent an examination in that case, and the court adjudged a recognizance sufficient, only upon the ground that a law subsequent to the one in relation to boats and vessels provided that any person might appeal by entering into a recognizance, &c., differing in that particular from the case before us. We agree with the argument of the counsel, that neither the wax nor the scrawl impart any particular virtue to an instrument in point of fact, or that their absence would lessen the security; yet if the statute requires the scrawl to be affixed, courts are not at liberty to dispense with it, although they might otherwise regard it as really unnecessary, and unworthy the age in which we live.

However much we may deprecate the necessity for the distinction in this case, it is no less the duty of this court to declare what the law is, and not what it should be.

As there was not any bond given for the appeal in this case as was required by the statute, the court did not err in dismissing the appeal.

But it is contended, that if the bond was defective, the appellants had the right to amend under the statute. The section relied upon will be found, upon examination, to apply exclusively to recognizances, and not to bonds, and has no connection with the statute regulating the action of forcible entry and detainer, it being perfect and complete within itself. We must first declare, that bonds and recognizances are synonymous in their legal signification and effect, before we can extend to the plaintiffs in error the benefit of the statute in relation to other appeals when recognizances have been given.

The district court did not acquire jurisdiction of the appeal, so as to enable the party to amend. There had not been a compliance with the statute, by which alone the court could be possessed of the cause, and the appeal could not receive any more consideration, than if the pretended bond had not been given. Instead of being a defective bond, it was not a bond at all. As giving the bond was

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a condition precedent to allowing the appeal by the justice, unless given, the appeal was improperly allowed, and the court could not take jurisdiction so as to permit an amendment or substitution.

In the case of *Ex parte Chryslin*, 4 Cow., 80, it was held, that unless there was a strict compliance with the statute requiring an appeal bond, the court did not acquire jurisdiction of the appeal, and although the bond was *merely defective*, the court refused to entertain jurisdiction for the purpose of allowing an amendment.

In this case, the court are not required to go so far, as there was not any bond filed before the justice, and therefore we are of the opinion that the court did not err in dismissing the appeal.

Judgment affirmed.

J. C. Hall, for plaintiffs in error.

J. M. Beck, for defendant.

DANIELS v. BATES.

When the plaintiff in an action of right waives all but nominal damages, the defendant cannot introduce evidence of a set-off for improvements.

ERROR TO DES MOINES DISTRICT COURT.

Opinion by GREENE, J. Joseph S. Bates sued Theodore Daniels in an action of right. The complaint was filed and proceedings had in the district court under the statute regulating the action of right. Rev. Stat., 526. The defendant's plea to the merits traversed the plaintiff's right to the land, and to damages for the detention. Upon the issue, the jury found the right of possession to be in the plaintiff, and assessed his damages at one cent.

Daniels v. Bates.

It appears by the bill of exceptions, that after the plaintiff had established his legal title to the premises, and submitted his cause to the jury without evidence of damages, the defendant introduced witnesses to prove the nature and value of permanent improvements made by him on the land in question, in order to recover compensation. To this testimony the plaintiff objected, and waived all right to more than nominal damages of one cent. This objection was sustained, and the defendant precluded from giving the testimony in reference to the improvements. The action of the court below in excluding this testimony is the only error assigned.

The 53d section of the act above referred to, is cited to show that the court improperly excluded the testimony. That section provides, that "where the plaintiff in an action of right shall be entitled to damages for withholding, or using, or injuring his property, the defendant shall be allowed to *set-off* any permanent improvements he may have made thereon, at their fair value to said plaintiff." This involves the inquiry, whether the defendant can claim compensation for permanent improvements in the way of a set-off, where the plaintiff has waived all right to damages. The determination of this question must depend upon the legal construction of the section of the statute above quoted.

That a party has a right to waive damages is a self-evident proposition, too obvious to be questioned. After damages have been waived by the plaintiff, the question arises, how can the defendant acquire a set-off? Against what can it operate? What claim or demand can it counterbalance in whole or in part? It would be doing violence to the common and legal acceptance of the term, to assume that a set-off can be made against nothing, or that a defendant can recover judgment by virtue of a set-off for any amount exceeding the plaintiff's demand, unless such proceeding is expressly authorized by statute; and even then the defendant's claim should be distinguished by some other name than that of set-off. Webster defines

a set-off to be the act of admitting one claim to counterbalance another. In 3 Black., 304, it is defined to be a claim which a defendant has upon a plaintiff, and which he sets up, or places against the plaintiff's demands. Holt-house, in his Law Dictionary, 393, describes it as a demand which the defendant in an action sets up against the plaintiff's demand, so as to counterbalance that of the plaintiff, either altogether or in part. Guided by this definition of the term, it will be difficult to apply a sound rule of construction to the section referred to, which will justify compensation to the defendant for improvement, by way of a set-off, where the plaintiff waives all but merely nominal damages. In our view, such a construction would do palpable violence to the obvious language and intention of the law. Had the legislature intended compensation to the defendant in such an action, other than that which would result from a legitimate set-off, but few words would have been required to disclose such intention. But we must be guided by the explicit letter of the law as it is. A clause in the statute, authorizing the defendant in an action of right to recover compensation for permanent improvements, might well be deemed expedient, as it would tend to the advancement of justice, and prevent a multiplication of suits; but such expediency should be addressed to the general assembly, as a reason for amending the act, and not to the courts, for a forced and unauthorized construction.

In an action before a justice of the peace, the defendant may set-off any demand which he may have against the plaintiff, and if his set-off amounts to more than the plaintiff's debt, a judgment for the excess is authorized by statute. Rev. Stat., 319, § 10. But this provision is limited to actions founded on contracts, and commenced before justices of the peace, and has no application to an action of right. We cannot, then, by mere intendment, extend this provision beyond the letter and spirit of the statute, especially as the construction sought is a departure from principles of common law.

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The right of the tenant or occupant to recover, in a proper action, for permanent improvements, is not properly the subject of inquiry in this case.

Judgment affirmed.

M. D. Browning, for plaintiff in error.

J. C. Hall, for defendant.



CAMERON *et al.* v. BOYLE *et al.*

In an action of debt on a replevin bond, it is a sufficient averment of non payment where the declaration states, "that no part of the said judgment and costs have been paid, and that the whole amount remains due and owing."

Where the execution returns state "no property found," it is sufficient to justify an action on a replevin bond under the statute, requiring a return, "that sufficient property of the plaintiffs cannot be found," &c.

Judgment cannot be impeached collaterally for mere irregularity.

If the important averments of a declaration are made, with a sufficient regard to the rules of pleading to put the defendant on his defence, they are sufficiently good.

When a demurrer is overruled, and the defendant fails to plead over within the time required by rule of court, judgment may be rendered against him.

Judgment may be rendered for the penalty named in a bond, as a security for the damages recovered upon the breaches assessed.

Judgment should not be rendered for a greater amount of damages than is claimed in the declaration.

ERROR TO DES MOINES DISTRICT COURT.

Opinion by WILLIAMS, C. J. This is an action brought by the plaintiffs below against the defendants on a replevin bond. The plaintiffs' declaration contains two counts. The first is on the obligation as a penal bond in the usual form, setting forth the execution on the day of its date :

the acknowledgment of the indebtedness of \$500; the liability of the defendants to pay the money on request, and the failure to pay it, although often requested.

The second count sets forth the making of the bond, &c., in the usual form, averring that it was subjected to a condition which is in terms set forth as follows: "Now the condition of this bond is such, that whereas said William S. Hathaway and William E. Clifford are about to replevy of one Alexander F. W. Webb and Anthony W. Carpenter, sheriff, &c., certain dry goods and groceries, described in a certain writ of replevin, now in my possession: Now if said William S. Hathaway and William E. Clifford shall appear at the return term of said writ and prosecute their suit to effect, and shall pay all costs and damages that shall be awarded against them, then this bond shall be void, otherwise remain in full force." Then are added the necessary averments that the bond was duly executed by Hathaway & Clifford, and Cameron & Dolbee as their securities; that a writ of replevin issued, and that the goods were apprehended and delivered to them, the plaintiffs, in the action of replevin.

Then follows the averment, as a breach of the condition of the bond, "that Hathaway & Clifford had failed to appear at the return of said writ, and prosecute the same to effect, and pay all damages and costs that were awarded by the court against them; but, on the contrary, that at the proper court, a judgment was entered against them, the said Hathaway & Clifford, for the sum of \$302.4 as damages in favor of the defendants Carpenter & Webb, and costs of suit. That an execution had issued against the defendants in the said judgment, and a return made thereon of "No property found in my bailiwick on which to levy this writ." The declaration then concludes with the averment, "That no part of the said judgment and costs have been paid; that the whole amount remains due and unpaid; that Hathaway & Clifford are non-residents of the county of Des Moines." The liability of the defendants, by reason of the promises is averred, and a general

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avermment of a request to pay, and a neglect and refusal to pay the same, or any part thereof, to the plaintiff.

Cameron & Dolbee were served with process, the other defendants not found. Cameron appeared and filed his demurrer to the declaration of the plaintiffs, and for cause of demurrer, says :

1st, There is no sufficient breach assigned in plaintiffs' declaration.

2d, Plaintiff does not show, in or by said declaration, that any right of action has as yet accrued to him.

The demurrer was overruled by the court. It appears by the record, that a rule to plead was entered on motion of the plaintiffs against Cameron, and that he failed to plead to the merits, having made no further appearance or defence in the case after the overruling of the demurrer.

The record also shows, that judgment of default was entered against the defendants, Hathaway, Clifford and Dolbee.

On the failure of Cameron to plead, a jury to assess the damages of the plaintiffs was empanelled, and a verdict was rendered as follows: "We the jury find in debt the sum of \$3600, being the amount of the penalty of the bond, and assess the damages by reason of the breaches of the condition thereof at the sum of \$272.68." Judgment was rendered on the verdict for the penalty \$3600 in debt, and also for \$272.68, the damages sustained by reason of the breaches of the condition of the bond. It is also made a part of the judgment, "that execution issue for the said damages and the costs of suit, with directions to the sheriff to collect no more than the money so assessed and costs; and further, that the judgment of said debt stand as a security for any further breaches that might be assigned on said bond."

On the 23d day of October, 1848, Cameron & Dolbee sued out their writ of error.

The cause is now presented for adjudication on the following assignments of error :

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1. The court erred in overruling the demurrer.
2. The judgment should be *respondeat ouster*.
3. The court erred in rendering judgment for the penalty, &c.
4. The judgment rendered is for more than the damages claimed in the declaration.

It is contended that the demurrer to the declaration should have been sustained by the court below, on two grounds. 1. That there is no absolute averment of a failure on the part of the defendants to pay, or satisfy the bond. 2. The declaration does not aver a proper and sufficient return to the execution, issued on the judgment in the action of replevin, to prosecute which the bond here sued was given.

By examining the declaration, we find that after a full recitation of the proceedings had in the replevin suit as inducements, showing the entry of final judgment against Hathaway & Clifford, the issuing of execution and the return thereof by the officer, it is averred "that no part of the said judgment and costs has been paid, and that the whole amount remains due and owing." This, we think, is sufficient as an averment of non-payment, or failure on the part of the obligors in the bond to comply with the terms of their obligation; and fully answers this ground of demurrer.

The second objection to the declaration is based upon an alleged variance between the language used by the sheriff, in making his return to the execution issued on the judgment in the action of replevin, and the return prescribed by the statute. The return of the sheriff, as set forth in the plaintiff's declaration, is "No property found in my bailiwick upon which to levy this writ." The 23d section of the replevin act (see Rev. Stat., 537) provides, "that no suit shall be instituted on the bond given by the plaintiff as provided in this act, nor against the officer who took the same, until an execution shall have issued on the judgment in favor of the defendant, in which it shall be returned, that *sufficient property* of the

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plaintiff cannot be found in the county whereon to levy and make the amount of the said judgment."

The only inquiry then is, as to the return of the sheriff in this case being a substantial compliance with the requisition of the statute? We think it is. The return of the sheriff is, "No property found," &c. This return not only shows that "sufficient property" could not be found; but that "no property" could be found, clearly and fully including all that is expressed by the language of the statute, and more. It would be a rigid, and, we think, unreasonable rule, which would declare such a return bad, for want of compliance with the requirement of the statute. The averment, as to the return of the sheriff, and the failure of the plaintiffs in the replevin suit, and obligors in the bond, here sued to satisfy the judgment, is sufficient in law to enable the plaintiffs to maintain this action.

Objections were made to the legality of the proceedings in the action of replevin, in which the bond here sued was given. This court cannot, in this proceeding, go behind the judgment in that case. We must consider the judgment, remaining as it does, unreversed and in force, as *rem judicatum*. As such, it cannot be impeached collaterally for mere irregularity. Besides, these objections relate to matter of inducement in the declaration, which might have been omitted; and without which it would have been good in law.

The declaration avers that the judgment remains unsatisfied, and the proper return of the sheriff on the execution is set forth substantially, so as to justify the commencement of the suit under the statute. The important averments of the declaration are made with sufficient regard to the rules of pleading, so as to put the defendants on their defence in accordance with the practice.

There is no error in the judgment of the court, overruling the demurrer.

But it is contended, that the judgment on the demurrer

was improperly entered ; that the court should have given a judgment of *respondat ouster* ; that the defendants were estopped, by the judgment of the court, from pleading to the merits.

The record shows, that after the default had been entered against Dolbee, on the same day of the filing of the demurrer, a rule to plead by a time certain, during the term, was taken against Cameron, and that the demurrer being overruled, the default was confirmed as to him, he having failed to plead. This was then a judgment for want of a plea.

We consider the practice in this state well settled on this point. The demurrer being overruled, the defendant had his election to stand on it, or to plead over. It was his privilege to move the court for leave to plead over, and proceed to trial on the merits. Having failed to do this, the court was justifiable in presuming that he stood upon his demurrer. Upon failing to plead by the time appointed, the judgment against him was a legal consequence. This is the practice, not only in this state, but it prevails elsewhere. *Godfrey v. Buckmaster*, 1 Scam., 447 ; *Gilbert v. Maggord*, *ib.*, 471 ; *Conradi v. Evans*, 2 *ib.*, 186.

The objection to the judgment rendered for the penalty, we think is not well taken.

This being an action at law on a penal bond, a judgment for the penalty was proper. From the character of the instrument, there could be but one breach assigned. It was competent for the plaintiffs to sue upon the bond, and at the same time declare and claim damages for the breach of the covenant. Rev. Stat., p. 471, § 16. Such has been the practice in this state under the statute, which provides that the judgment may be entered in debt for the penalty, as a security for the breaches, and also, at the same time, if breaches are assigned in the declaration, for such damages as may be proven to have been sustained by the plaintiffs. This mode of procedure fully protects the interests of the parties litigant, whilst it prevents, in

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cases like this, circuity of action and accumulation of costs. In this there is no error.

The 4th error assigned is well taken. The plaintiffs declare for the sum of \$100, as the damages which they have sustained by reason of the breach of the condition of the bond. The measure of the damages sustained by the plaintiffs did not depend upon the penalty, but upon the breach of the condition of the bond. The plaintiffs, upon the ascertainment of the amount of damages, by proof to the jury, were entitled to recover *pro tanto*.

The sum assessed by the jury, and for which judgment is entered, is \$272.68. That claimed in the writ is \$3600, debt and \$100 damages; judgment is entered for that amount in debt, and \$272.68 as damages. The declaration, as to the damages, follows the writ of summons claiming (as damages) \$100. This sum is clearly claimed, in the declaration, as the plaintiffs' damages for the breach of the condition of the bond. The plaintiffs can recover no more than they have claimed in their declaration, and as the judgment in debt was to the extent of the writ and declaration, the judgment and damages could not be any part of the judgment for debt as claimed in the argument. There is, therefore, in this, error in the judgment of the court below. *Horner v. Hunt*, 1 Blackf., 214; 3 Scam., 348.

This error may, however, be cured by the plaintiff coming into court now, and entering a *remittitur*, otherwise the judgment is reversed.

Judgment reversed.

D. Rorer, for plaintiff in error.

J. C. Hall, for defendant.

Hine v. Houston.

HINE v. HOUSTON.

After going into a trial upon the merits, and the plaintiff has proved his claim for work, the defendant should not be permitted to introduce evidence that the work was done for him and another jointly, in order to avoid the liability.

The omission to join all the parties should be taken advantage of by plea in abatement.

ERROR TO LEE DISTRICT COURT.

Opinion by KINNEY, J. This was an action commenced before a justice of the peace for work and labor, in which the defendant in error recovered a judgment. Hine appealed to the district court, and upon trial a judgment was rendered against him for \$97.41.

From the bill of exceptions taken on the trial by Hine, it appears that after Houston had closed his evidence, the defendant below offered to prove that the work was done for him and Adam Hine, that they were jointly interested in the work, and that it was done by Houston on their joint account. The defendant in error objected to the introduction of this testimony; it was held by the court to be inadmissible. To this ruling Hine excepted, and assigns it for error.

This was not error, and the court was right in excluding from the jury the testimony offered. The plaintiff in error could not, at that stage of the trial, prove the joint liability of a third person, and thus escape an individual liability. As Adam Hine was not a party defendant, the introduction of testimony fastening a joint liability upon *him*, could not avail anything upon the trial, except to defeat Houston in his action. He could not without the proper plea (having gone to trial) be permitted in this way to prevent a recovery.

By the rules of pleading, an ample remedy is provided where there is an omission of the necessary parties, or a nonjoinder of defendants. But the law is well settled,

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that he could only take advantage of this by a plea in abatement.

If a party defendant be omitted, whether liable to be jointly sued upon a personal contract, or as person of the profits of real estate as in debt for a rent charge, the advantage can only be taken by a plea in abatement, verified by affidavit; and if this be omitted, the defendant will be chargeable with the whole debt. 1 Chitty's Pl., 31.

The omission of a joint contractor must be pleaded in abatement. Chitty's Pl., 441; *Larton v. Gilliam*, 1 Scam., 577.

That a plea in abatement was the proper remedy in this case for the plaintiff in error, if what he sought to prove was true, we think too clear to require further notice.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

W. J. Cochran, for defendant.



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An indictment is good, which substantially follows the language of the statute defining the offence.

Not necessary that the indictment should charge the offence in the **very** language of the statute, if words of the same import and equally **comprehensive** are used.

The name of the person to whom counterfeit money was passed should be set forth with certainty in the indictment, unless the name is **unknown**; and if so, that fact should be stated.

While unmeaning forms should not be enforced, **clearness and certainty** should be required in pleadings.

ERROR TO LOUISA DISTRICT COURT.

Opinion by GREENE, J. This was an indictment for passing counterfeit money. The indictment charges that

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Sylvanus Buckley of &c., on &c., had in his possession in &c., seven pieces of false money and coin, forged and counterfeited to the likeness and similitude of the good and legal money and coin within this state, made current by the law and usage thereof, called half dollars, and that the said Sylvanus Buckley the aforesaid pieces of false forged and counterfeit coin then and there did pass, utter and tender in payment as good, with intent, one Italian M. Myler, then and there to injure and defraud; the said Sylvanus Buckley then and there well knowing the aforesaid pieces of coin to be false, forged and counterfeit, &c.

The question coming up on demurrer in the court below, the indictment was pronounced good and sufficient in law, and the demurrer overruled. The correctness of this ruling is now controverted.

It having been repeatedly decided by this court that an indictment is good which substantially follows the language of the statute defining the offence, we have but to inquire whether the one at bar can be supported under that test.

The clause of the statute upon which this prosecution appears to have been commenced provides, that "if any person shall counterfeit any of the coins of gold, silver or copper currently passing in this territory, or shall alter or put off counterfeit coin or coins, knowing them to be such, &c., every person so offending, upon conviction thereof, shall be fined," &c.

It is objected to the indictment, that the words used as descriptive of the offence are not the same as those used in the statute. It is true that it does not contain the words "put off," but words of the same legal import and equally comprehensive are used. The words "pass and utter" are substantially the same, they include the words "put off," and are even more significant of the offence charged. We regard the indictment in that particular as a substantial compliance with the statute. And the *scienter*, which is also objected to, is charged in sufficiently explicit terms.

But an objection is urged to the indictment of a more

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serious character. It does not in express terms allege that the counterfeit money was passed or uttered to any particular person, though it contains language that might justify the inference, that the money was passed upon Italian M. Myler, still, as it does not expressly charge to that effect, it leaves room for doubt. The name of the person to whom counterfeit money was passed should be set forth in the indictment with certainty, unless the name of such person is unknown, and if so, that fact should be stated. The name of such third person should be designated as the one upon whom the offence was committed, not only because he is injured, but because his designation is material as descriptive of the offence. *Butler v. The State*, 5 Blackf., 280.

In relation to the necessity of setting forth the names of third persons in an indictment, see 1 Chitty's C. L., 211; *Davis v. The State*, 7 Hammond, 204.

This defect being material in describing the offence, we cannot regard it as within the meaning of the statute, which declares that "no indictment shall be quashed if an indictable offence is *clearly* charged therein." Rev. Stat., 153, § 46. There is a want of clearness, a degree of ambiguity in that part of the indictment, which renders it inapplicable to the saving clause in the statute. It may as well be observed, however, that the defect complained of in this case would not prove availing after verdict, if not previously raised by demurrer or on motion to quash.

Although mere nicety and unmeaning forms should not be encouraged in pleadings, especially in criminal proceedings, where public security mainly depends upon the prompt administration of justice, still carelessness, resulting in uncertainty and ambiguity, cannot safely be overlooked by courts of justice. Incalculable mischief must necessarily result to parties, uncertainty and disgrace in legal proceedings, unless pleadings are framed with substantial clearness and certainty.

Judgment reversed.

D. Rorer, for plaintiff in error.

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BARNEY v. CHITTENDEN *et al.*

The conclusive effect of the judgment of partition of the half-breed lands, as established by *Wright v. Marsh. Lee & Delavan*.

A majority of the trustees, under the articles of association, of the New York Company, have power to convey the title of said company to lands in the "half-breed tract," and the conveyance may be made by themselves, or by their attorney.

Where it appears to the court that no person interested intends to object to the probate of a will, it may be granted upon the testimony of one subscribing witness.

The probate court, though limited and inferior in power, had complete original jurisdiction in administering the estates of decedents; and any judgment, order or decree, upon a subject matter, and between parties over which the court had jurisdiction, cannot be collaterally questioned.

It will not be presumed that the probate of a will was granted without sufficient proof, nor that letters testamentary were issued without the bond required by law.

ERROR TO LEE DISTRICT COURT.

Opinion by WILLIAMS, C. J. This is an action of right, commenced in the district court of Lee county by John McKean against John C. Barney, to recover the possession of a tract of land described as the west half of the south-west quarter of section 13, in township 65 north, of range 5 west in said county, which he claimed in fee simple. The suit is instituted for the immediate possession, and damages for detention of the premises. On the 16th day of October, 1846, John C. Barney appeared and filed his plea denying the right of McKean, and issue was joined. On the 10th day of June, 1847, the death of John McKean, the plaintiff, was suggested, and his executors, A. B. Chittenden and William F. Telford, were substituted and entered as parties to the suit. The cause was tried at November term, 1848, and a verdict and judgment thereon for the plaintiffs. It is now hereupon a writ of error, and the following are the assignments:

1. The court erred in admitting in evidence the books

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containing the record of partition, as evidence of legal title in Marsh, Lee & Delavan to the property in question.

2. In admitting the power of attorney from Marsh, Lee & Delavan to D. W. Kilbourne, and the deed from Marsh, Lee & Delavan by D. W. Kilbourne to John McKean.

3. In admitting the will of John McKean, deceased, the probate thereof, and letters testamentary, as set forth in said bill of exceptions, as evidence of legal title in said plaintiffs below.

4. The court erred in excluding the proof offered, and the instructions asked by defendant below, as contained and set forth in said bill of exceptions; and in refusing to rule out the record of partition, on the ground that part of said tract at the time of partition was situated in another county.

Chittenden and Telford, executors of John McKean deceased, the plaintiffs, claim the land by virtue of purchase and a deed of conveyance from Marsh, Lee & Delavan, trustees of the New York Land Company, by David W. Kilbourne, their attorney. On the trial, the plaintiffs offered in evidence the treaty of the 4th of August, 1824, between the United States and the Sac and Fox Indians, and the act of Congress of the 30th of June, 1834, entitled "An act to relinquish the reversionary interest of the United States in a certain Indian reservation lying between the rivers Mississippi and Des Moines." And then offered to read in evidence from two books produced by the clerk of this court, as of record in his office, among the proceedings and judgments of the district court in this county, under the territorial government, and bearing the signature of the territorial judge, record of certain proceedings partitioning the "half-breed tract" among the owners, but offered no other evidence than what was furnished by these circumstances of the genuineness or authenticity of the records, or that the books were what they purported to be, or that they were found in the proper depository.

To the admission of this evidence, the counsel for the

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defendant objected. This objection was overruled by the court, and the evidence read to the jury.

By the treaty made between the United States and the Sac and Fox tribes of Indians, on the 4th of August, 1824, a large and valuable tract of country lying between the Des Moines and the Mississippi rivers was reserved for the half-breeds of the Sac and Fox tribe of Indians. By an act of Congress passed the 30th of June, 1834, the reversionary interest of the United States in this land was relinquished, so as to vest the fee simple title to them, in the half-breeds aforesaid. The treaty and act of Congress both speak of them as a class of people known as "half-breeds," without naming them individually. Josiah Spalding and others, who claimed to be the owners by purchase of shares or undivided interests in these half-breed lands, on the 14th day of April, A.D. 1840, filed their petition for the partition of these lands among the owners thereof. The petition sets forth, that the tract contains about 119,000 acres more or less. The names of claimants are set forth in the petition, claiming twenty-three and one-third shares, to which they claim the title in fee simple.

This proceeding for partition was commenced and conducted to judgment under the general partition law of the territory. In the case of *Mitchell D. Wright v. Marsh, Lee & Delavan*,* this court has decided the question of the legal effect of the judgment in partition. It is, therefore, not necessary here to consider that question. It is sufficient to say, that the jurisdiction of the court, and the validity of the judgment of the district court of Lee county, partitioning the land among the owners therein named, have been established and fixed for all the purposes of this case by that decision.

The effect of the proceeding in partition, under the statute, in imparting title to the holders of shares under the judgment, is also established by the same decision.

* Ante, 94.

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As the first assignment of error is disposed of, we will proceed to consider the questions involved in the second.

The judgment in partition shows that the land in dispute is a portion of the "half-breed tract" which fell among the shares of Marsh, Lee & Delavan, as trustees of the New York Company. John McKean in his lifetime held the land in question by virtue of a deed of conveyance from David W. Kilbourne, who made and executed it, as the attorney of Marsh, Lee & Delavan, trustees of the New York Company, which deed, together with the power of attorney, and the articles of association of that company, were offered and read in evidence to the jury by the plaintiff. To this evidence, the defendants' counsel objected. The objection was overruled and exception taken. It is contended that the conveyance from Marsh, Lee & Delavan by Kilbourne, their attorney, to McKean is of no effect, because, by the articles of association of the company, less than the whole number of trustees could not convey title to their lands; whereas, in this case, but three of the trustees make the deed, by their attorney. The power of the three trustees, Marsh, Lee & Delavan, to convey the title to the land by attorney or otherwise, is denied.

By reference to the judgment in partition, apportioning the "half-breed tract" among the owners, we find that the interest or shares of the New York Company were set-off to and vested in Marsh, Lee & Delavan in trust, for the members thereof, without naming any other persons as trustees. The two other trustees, Aikin and Galland, originally named in the articles of association with them, are not recognized in the proceeding in partition, or the judgment. The partition law of this state, under which this land was divided among the owners, provides for the establishment of the interest or titles of the several claimants by evidence and trial by jury, unless the parties to the proceeding shall otherwise agree; and that when the various interests or shares shall be so ascertained, judgment

shall be rendered confirming them, and that partition be made accordingly. Rev. Stat., 461, §§ 16-19.

This judgment in partition had the effect of establishing title to these lands in those whose interests were then passed upon and adjudicated. Such has been the decision of this court in the case of *Wright v. Marsh, Lee & Delavan*, decided at this term. The New York Company, then, being the owners of that portion of the "half-breed tract" which was set-off to them by the judgment in partition, might dispose of it in accordance with the provisions of their articles of association. We do not deem it necessary here to enquire how or why only three of the trustees of the company, of the five named in the articles of association, are made parties in the judgment of partition, as trustees, to whom, by the decision of the court, the interests of the persons composing that company are committed. The articles of association, properly construed, must solve the question here raised. Then, had a majority of the trustees a right to contract for the sale of the company's land, and make a title to the purchaser? And if so, could such majority empower an attorney to make such contract, and impart the title to the land?

It is contended for the plaintiff in error, that to enable the trustees to sell and convey the title in fee simple to McKean, that all should have joined in the act, and that as only three out of the five have done so, therefore the deed is void and conveys no title. To sustain this position, the articles of association are referred to.

In order to a proper decision of this question, it is necessary to examine into the object of the association, and fairly ascertain the intention of the parties, as expressed in their articles. They were entered into on the 22d day of October, 1836, by Joshua Aikin, Isaac Galland, Samuel Marsh, Benjamin F. Lee, William E. Lee, George P. Shipman, Henry Seymour, Edward C. Delavan and Erastus Corning, to purchase certain lands situated between the Des Moines and Mississippi rivers, then in Wisconsin territory, part of the tract of land known as the "half-

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breed tract." After setting forth the nature of the tenure by which the parties were to hold the lands purchased, the extent of the investment of capital, &c., in order the better to enable them to manage the property, &c., among other things it is provided, that the title to all the land purchased for the use of the company shall be conveyed to and vested in the trustees, viz., Joshua Aikin, Isaac Galland, Samuel Marsh, William E. Lee, and Edward C. Delavan, as joint tenants, and not as tenants in common, in trust for the persons and parties interested therein. The proportions in interest of each of the parties are fixed; and then the third principal division of the agreement or article proceeds to provide for the trustees, their powers, in the following terms: "*Thirdly*, And the parties hereto covenant and agree, that the said trustees, or a majority of them, shall have power, and it shall be their duty—

"1. To cause the title to said lands and property to be thoroughly examined and established, in such form of proceeding as they may be advised to be proper to protect the parties in interest against any loss or question on account thereof.

"2. To cause the land purchased to be surveyed, so that the exact quantity of land acquired by the parties hereto, by the purchases already made, or hereafter to be made as herein provided, shall be ascertained."

The third subdivision directs that they shall cause to be surveyed and laid out town sites, &c.

The fourth subdivision of the third article then is as follows: "And the said trustees are hereby authorized to sell and convey from time to time, as they may find opportunity, any part of the lands so purchased, on such terms as to payment, and to take such securities for the purchase-money, or any part thereof, as they shall think fit."

The fifth subdivision of the same article is as follows: "And the trustees, or a majority of them, are also authorized to make all contracts, and do all lawful things and acts that may be necessary or proper, to carry into effect

the objects of this agreement, and to promote the interests of the parties concerned, in respect to the property purchased, and every part thereof.”

The sixth and last subdivision of this third article provides for the appointing of attorneys, clerks, &c.

The succeeding articles provide for the management of the lands, and among other things, for their sale, and the manner in which the avails in money are to be applied for the benefit of the parties.

Taking these articles together, we find no difficulty in ascertaining the intent of the parties in reference to the power given to the trustees, and the manner in which that power was to be exercised in acquiring, managing and disposing of the lands. To supersede the necessity of all the parties to the agreement of association acting in the conducting of the business of the company, with a view to convenience and economy, five trustees were named and duly appointed to act for the whole of the parties interested. By express terms they are to receive, hold and impart title to the lands for the use and in trust for the company.

The third article designates the powers of the trustees, and taken in connection with the other portions of the agreement, there can be no doubt that it was intended that their power should be plenary, in the purchase, management and disposal of the lands by the act of the majority of their number. Any other construction would, we think, thwart the parties in the accomplishment of the design contemplated. Any one of them, objecting to the sale of any portion of the land, would render it impossible, when it expressly provided that they may sell to accomplish the object of association. Taking the whole agreement together, we find no difficulty in coming to the conclusion that a majority of the trustees had power to impart the title to the plaintiff.

But this question is not left for solution to inference, nor is it left for decision dependent upon rules of construction. The power to sell and convey the title, is expressly given

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to the trustees, *or a majority of them*, by the third article or general division of the agreement or articles of association. This is apparent upon an examination of this article. It provides, that "the parties mutually covenant and agree that the said trustees, or a majority of them, shall have power to do and perform certain acts;" and proceeds to designate and classify them by numbers, from one to six in subdivision. Much stress has been put by the counsel for the plaintiff in error upon the language of the fourth subdivision of this article. This, it is alleged, gives to the whole of the trustees the power to sell and convey the lands, in terms which are specific, and excludes the idea that a majority might do so. The language is: "And the said trustees are hereby authorized to sell and convey," &c. Taken in proper connection with the commencement of the article, where it is expressly provided, that "the said trustees, or a majority of them, shall have power, and it shall be their duty," to do the things specified in the several subdivisions following, of which this is one, we think, by a proper observance of the rules of legal construction, as well as those governing the use of language, the words, "and the said trustees," will be taken to refer to the trustees as a body, and as set forth in the commencement. This conclusion is sustained by the other parts of the agreement, reasonably and fairly construed in view of the obvious design of the parties in forming the association, and the reasonable use of the means adopted for its accomplishment. But this point is clearly set at rest by the fifth subdivision of this article. The parties to the agreement, after specifying certain things which the trustees may do, here empowers "the said trustees, *or a majority of them*, to make all contracts, and to do all lawful things and acts necessary or proper to carry into effect the objects of this agreement," &c. This we consider is designed to give plenary power to the trustees, *or a majority of them*, as a board to act for the company.

As we have already said, a different construction of the articles of association would not be warranted by the lan-

guage used, and would put the parties to the agreement in the unreasonable position of using means most likely to prevent the attainment of the object for which the company was formed.

This is not a mere trust to hold the title to lands, for the use and benefit of persons incapable of contracting. The design of the association is to get gain and profit by the purchase and sale of lands. The purposes and object of the association are clearly set forth in the articles. It is urged by the counsel of the defendant that the deed from Kilbourne, the attorney of Marsh, Lee and Delavan, the trustees of the company, to McKean, is void, and conveys no title, for the reason that only three of the five trustees have joined in making it; that all the trustees must act conjointly in executing the trust. The case of *Sinclair v. Jackson*, 8 Cowen, p. 543, is cited to support this doctrine. In that case it is decided that "where a trust is delegated to several for a mere private purpose, they must all join in its execution," and the question is then discussed as to the power of trustees to lease without express power. But we find that the chancellor who delivered the opinion of the court in that case, in discussing the question as to the power of trustees to convey the trust estate separately, says: "As applicable to joint tenants of estates in their own rights, this position (that they might lease) may be true; but the principle cannot apply to trustees. They have no separate interests of their own on which the separate deeds can operate; they conjointly represent the interests of the *cestui que trust*, and, unless specially authorized to act separately by the instrument creating the trust, they can make no disposition of the trust estate vested in them, otherwise than by their joint deed." This applies directly to the case at bar. We have already shown that the articles of association specially authorize a majority of the trustees to sell and convey the company lands, so that the principle here avowed establishes the validity of the deed to McKean.

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Among the authorities cited, none have questioned the acts of the trustees, when performed in pursuance of express authority.

That Marsh, Lee & Delavan, being a majority of the trustees, and acting within their trust, have power to sell and convey the land in fee simple, under the articles of association, we think, does not admit of a doubt.

It is also contended that the trustees could not convey the title to the land by attorney. Whether trustees can convey lands by an attorney, without express authority to do so in the instrument creating the trust, depends upon the nature of the trust, and the instrument by which the trust is created. In the case at bar, the question is disposed of by the articles of association, by which the trust is created. The sixth subdivision of the third general article, in speaking of the power vested in the trustees, or a majority of them, provides, "To employ, substitute and authorize such attorney or attorneys, agents and clerks, as may be necessary in executing the object of their agreement, and in the care and management of said property, and to allow them such compensation for their services as they may think fit." What are "the objects of the agreement to be carried out and necessary to be executed," to do which an attorney or attorneys might be appointed by the trustees, or a majority of them? Clearly, among many other things, to sell and execute deeds conveying the title to the lands to the purchasers thereof. It will not be contended, seriously, that the parties, owners of these lands, could not, by their solemn agreement, with a view to promote their interests, empower their trustees, or a majority of them, to appoint an attorney to act for them in receiving and imparting title. That such an arrangement would be calculated to facilitate the business and promote the interests of the company is evident. The bill of exceptions shows that Marsh, Lee & Delavan, as trustees for the company, by their power of attorney dated the 6th day of June, 1844, did authorize David W. Kilbourne to act for them in the

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purchasing and selling of lands on the half-breed tract, and to receive and impart the title, in such manner, and as fully as they could themselves by virtue of the articles of association, for the company.

The ruling of the court below, as to this point, is in accordance with the principles of law. We know of no case where it has been decided that the parties owning lands, whether as individuals, or persons associated by agreement in company form, may not authorize and empower in express terms others to act for them in conducting their business, or to buy, sell, receive and confer the title to lands. The cases cited by the counsel for the defendant, and ably urged, as applicable to this case, do not affect those of express power given by those having the legal right to impart it. The case of *Pearson v. Jameson*, 1 McLeans, 187, is the case of an executor who was empowered to sell an estate "in the best mode *in his* judgment for the interest of the estate." It was decided that it was "a personal trust," his judgment was relied on for the best interests of the estate. He could not delegate said trust to another. Besides, the language of the trust, as created, could not be construed as authorizing him to delegate his power to another, as in the case at bar; such also is the case in 4 John's Ch., 367. It is there decided that an executor could not delegate the power of selling to an attorney. The principles of law recognized in these cases are indisputable, but cannot be applied to the case at bar. The power to sell and convey the lands of the company, as well as authority to appoint an attorney to act for them in carrying out that power, is expressly given to the trustees, or a majority of them. Marsh, Lee & Delavan, a majority of the trustees, confer upon Kilbourne, the attorney, authority to sell and convey the title to the land. The object of the association being legitimate and proper, they who were entrusted, as parties, had a right by agreement to ordain the terms and mode by which they would manage and dispose of their interests in the property. Having done so in plain and express

terms, it is the duty of the court to give to the conveyance the sanction of law.

Construing the articles of association thus, we think that a majority of the trustees have plenary power to make contracts for the purchase and sale of the lands of the company, and to act by attorney therein. The numerous cases cited by the counsel of the plaintiff in error, on the subject of the power of trustees, not expressly given, are not applicable to the case at bar.

It is also contended that the district court erred by admitting in evidence the will of John McKean, deceased. That it was inadmissible, because the probate thereof was made by only one subscribing witness, and no consent or satisfactory evidence shown to have been presented to the court of probate of its execution.

The statute of the state on the subject of wills, Rev. Stat., p. 668, § 13, provides, that "when it shall appear to the judge of probate, by the consent in writing of the heirs at law, *or by other satisfactory evidence*, that no person interested in the estate intends to object to the probate of the will, he may, on his discretion, grant probate thereof upon the testimony of one of the subscribing witnesses, without requiring the attendance of all of them, although the others should be within reach of the process of the court."

The will was made by John McKean, the deceased, in the presence of three subscribing witnesses. It bears date February 23, 1847. Probate thereof was made before Philip Veile, judge of probate for Lee county, on the 2d April, 1847, by the testimony of Peter Young, one of the subscribing witnesses. The probate judge sets out in his record, that on the day last named, Peter Young, one of the subscribing witnesses to the will of John McKean, late of said county, deceased, appeared in the court of probate in said county, and after having been duly sworn, declared on oath that he was present at the execution of said will, and saw the said John McKean subscribing his name to the above instrument, and declare

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that the same was his last will and testament; and that he, together with Justin Millard and James Hill, the other witness, subscribed their names as witnesses in the presence of the testator, at his request, and in the presence of each other; and that said John McKean, at the time of executing said will, was of full age and sound mind."

The statute cited above vests the probate judge with discretionary power to grant the probate upon the testimony of one of the subscribing witnesses, if he be satisfied, by consent of the heirs or other evidence, that no one interested in the estate intends to object to the probate thereof. It is urged that the probate court did not acquire jurisdiction of the case under the will of John McKean, the deceased, so as to grant the letters testamentary to Chittenden and Telford, for the reason that the probate of the will, as made by the judge, was not in accordance with the requirement of the statute on wills. This objection cannot prevail here. So far as administration is concerned, both of real and personal estate, the probate courts have, by our statute, the complete original jurisdiction. Though this court may be held, as an inferior tribunal, of limited power, being by the statute confined in its jurisdiction to the cognizance and judicial adjustment of the estates of decedents; nevertheless, its judgments, orders and decrees, made within the scope of its specific powers, as prescribed by the statute, are to be regarded as conclusive against collateral attack, when jurisdiction has attached, as to the parties and the subject matter.

The probate of the will by the judge, and the granting of the letters testamentary to Chittenden and Telford, are judicial acts within the proper sphere of the court in the exercise of its jurisdiction, and cannot be impeached for irregularity such as is here alleged. The court must be presumed to have acted, in ordering the probate of the will, with a sound discretion, in compliance with the statute. In other states the courts have treated the orders

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and decrees of these courts not only as *prima facie*, but as absolutely conclusive, when acting within the limits of their jurisdictional power. In Pennsylvania, the decrees of this court, on settlement of an account, &c., are placed as far above impeachment as the adjudications of any other courts. *McFadden v. Geddis*, 17 Serg't & Rawle, 333; *App v. Driesback*, 2 Rawle, 287; *Wimmer's appeal*, 1 Wheaton, 65. The trust and duty appointed by the will, confirmed upon proof, and adjudged sufficient by the court in granting the letters testamentary to the plaintiffs, furnishes conclusive evidence of the fact to all persons. 1 Con. U. S., 7. In Louisiana "the sentence of a court of probate ordering the execution of a will is *prima facie* evidence that it was duly proved. *Donaldson v. Winter*, 1 Mart., 137, 144. And also, that when probate transactions are put in question, the appointment of the executor or administrator by the court of probate cannot be questioned for error, even if letters were granted to the wrong person, &c. Such defects can only be set right upon appeal. *McComb v. Dunbar*, 1 Mart., 18, 21. This court, particularly as constituted and regulated by the statute of this state, is presumed to have acted correctly in granting the letters testamentary upon the probate of the will. The 30th section of the act on wills, &c. (see Rev. Stat., Iowa, p. 672) provides, "That the probate of a will, dividing real estate, shall be conclusive as to the due execution of the will, in like manner as it is a will of personal estate." We therefore consider the probate of the will, as set forth by the record of the probate court, sufficient for the purposes of the plaintiffs in this case, establishing the execution of the will, and authorizing the plaintiffs to act as the executors under it. The court possessing entire and general jurisdiction of probate matters under the statute, and being competent to exercise full power in adjudicating them, the presumption is in favor of the correctness of its procedure. *Brown v. Wood*, 17 Mass., 72; 2 Greenl. on Ev., § 339.

The fourth assignment of error is, that the plaintiffs could

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not sustain their action, not having shown that they executed bonds, as required by law.

What has been already said upon the previous assignment is applicable to this. Upon the production of letters testamentary, authorized by the proper officer in due form of law, they were entitled to legal recognition in court, as the executors of the last will and testament of John McKean, to maintain this action in order to the establishment of the rights and interests of the estate.

Judgment affirmed.

Geo. C. Dixon, for plaintiff in error.

J. C. Hall, for defendant.



COONROD v. BENSON.

The neglect of the court to render a judgment *non obstante veredicto*, on the ground of an insufficient plea, cannot be urged as error unless a motion was made for such a judgment, and exception taken to the ruling of the court.

ERROR TO LOUISA DISTRICT COURT.

Opinion by KINNEY, J. Coonrod sued Benson in assumpsit, and declared upon a note given on the 24th day of February, 1842, calling for \$141.

The defendant pleaded the general issue, gave notice of the failure of consideration, and pleaded that the right of action did not accrue to the plaintiff within six years before the commencement of the suit. The plaintiff replied in short, by consent, to the plea of the statute of limitations, and the cause was submitted to the court upon the issue made by the plea of the statute and the

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plaintiff's replication. The court sustained the plea, and entered judgment for costs against the plaintiff, to which he excepted, and assigns the decision for error.

The issue made by the pleadings and tried by the court was simply this—Did the right of action accrue within six years prior to the commencement of the suit? The defendant says in his plea that it did not; the plaintiff, in his replication, that it did; and here the parties were at issue. The court, upon this issue, found for the defendant, that the right of action did not accrue within six years; and this was the fact, as the note was given more than six years prior to the commencement of the suit.

The pleader probably supposed, when he filed his replication, that it would have the effect of a demurrer, and would test the question of law tendered by the plea; but such is not the effect of a replication.

Although the plea, according to the repeated decisions of this court, did not, if true, constitute any defence to the action, yet the court could not have decided differently under the state of the pleadings. The issue was merely one of fact, and not of law. The court, by consent, acted in the capacity of jury in determining the fact, and found correctly. But it is now contended by the plaintiff in error, that as the judge was substituted for the jury, the plaintiff having a good cause of action, the defendant having put in a bad plea, and the decision being in favor of that plea, the court should have rendered a judgment for the plaintiff *non obstante veredicto*. If the case had been submitted to the jury as made by the pleadings, and the jury had found for the defendant, upon motion, the court could have rendered a judgment in favor of the plaintiff *non obstante veredicto*, and a refusal to enter such judgment would have been good cause of reversal.

But it is urged, that as the judge acted in the place of the jury, the same doctrine should obtain. This is true; but if the plaintiff desired a judgment *non obstante veredicto*, he should have made a motion to that effect, and

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if it had been overruled and excepted to, he could then have had his remedy by writ of error.

But the bill of exceptions taken in this case was to the decision of the court in sustaining the plea. We cannot change its character, nor apply it to anything except to the decision which it seeks to correct, and which formed the basis for the exceptions.

The plaintiff, therefore, in this case should have demurred in order to avoid the plea of the statute of limitations. As he did not demur, and as the plea was no defence to the action when the court found the facts in favor of the defendant, he ought to have moved for a judgment "*non obstante veredicto*." As the plaintiff, therefore, has not put his case in a position to claim the aid of this court, and as there was no error in the decision, the judgment must be affirmed.

Judgment affirmed.

Grimes & Starr, for plaintiff in error.

D. Rorer, for defendant.



FORSYTH & CO. v. RIPLEY.

The statute of limitations, approved February 15, 1843, cannot be pleaded in bar of an action of debt, covenant, &c., within six years after the act commenced running.

The decision in *Norris v. Slaughter*, 1 G. Greene, 338, approved.

The limitation act of 1839, having been unconditionally repealed by the act of 1843, without a saving clause, the time which an indebtedness had run under the old act cannot be included as limitation time under the new act.

As the limitation act of 1839 had not been in force the requisite period of six years, nor connected with the Michigan act of 1820, it cannot be pleaded as a bar to an action of debt.

Forsyth v. Ripley.

A repealed statute of limitations, under which an action had been barred, should be specially pleaded.

At common law, payment from lapse of time will not be presumed, unless the debt has run twenty years, and the debtor pleads or alleges payment. No statute should have a retrospect beyond the period of its commencement, nor be so construed as to divest acquired rights.

ERROR TO DES MOINES DISTRICT COURT.

Opinion by GREENE, J. This was an action of debt on a note under seal, executed March 8, 1834, by John Ripley, payable three months after date to John A. Forsyth & Co. The defendant pleaded the statute of limitations; to this plea the plaintiffs demurred, and the demurrer was overruled. It is urged that the court erred in overruling the demurrer, on the ground that no statute of limitations had been pleaded, which could operate as a bar to the action. By former adjudications of this court, it has been repeatedly decided that the statute of limitations, approved February 15, 1843, (Rev. Stat., 384,) cannot be successfully pleaded in an action of debt, covenant, &c., within six years after the act commenced running. As the act acquired no vitality till July 4, 1843, (Rev. Stat., 377, § 1,) and as it repealed, without saving clause or connection, the limitation law then in force, any such action commenced prior to the 4th July, 1849, cannot be barred under that statute. The present action was commenced September 9, 1848, and is within the limitation period. This principle was first recognized by this court in *Norris v. Slaughter*, 1 G. Greene, 338.

The "several legal inferences" in *Norris v. Slaughter*, we do not regard as mere *dicta*, as is claimed by counsel, but as approved rules and established principles, which governed the decision in that case, and which we must continue to recognize as sound principles of law. Having been so repeatedly guided by those rules in analogous decisions, a review of the reasons which led us to their adoption can hardly be deemed necessary. With whatever favor courts may contemplate such an act, in extending peace and repose to the negligent debtor, we cannot,

by implication, divest the rights of a creditor, by giving to a legislative enactment a retrospective operation.

As the act for the limitation of actions, approved January 25, 1839, was unconditionally repealed by the present law, without reservation, connection or saving clause, the time which the indebtedness had run under the old law could not, with a proper regard to legal construction or legislative intention, be included as limitation time with the law now in force. And as the act of 1839 had not been in force the requisite period of six years, nor connected with the Michigan act of 1820, it could not, even if pleaded, operate as a bar to the present action. Nor could the Michigan act of 1820 be successfully pleaded. That act, if applicable to an action of debt on a writing obligatory, did not commence to run on the present instrument until June 8, 1834, and in less than five years was superseded by the limitation law of 1839, which was also enacted without connection or continuation with the prior statute.

But had the indebtedness run a sufficient time under either of the old statutes to bar the action, the repealed law relied upon should have been specially pleaded; otherwise the plea of limitation will be considered as applying only to the law in force. Under this rule, which we regard as salutary, it is not necessary to decide whether the present action is comprehended within the objects of limitation designated by the Michigan act; for neither that, nor the act of 1839, can be appropriately urged, as applicable to the present proceeding.

It is contended by counsel for the defendant in error, that the court below properly overruled the demurrer, because payment might be presumed at common law, from the lapse of time. This position, for two conclusive reasons, cannot prevail. 1. The lapse of time after the cause of action accrued is not sufficient to justify such a presumption in law. 2. A party can only avail himself of this presumption under a plea or allegation of payment. Cowen & Hill's Notes, 316, 350, 351; *Tibbs v. Clark*, 5 Monroe, 526. And even where twenty years have elapsed, the pre-

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sumption of payment is not absolute. Such a lapse of time after the right of action accrues, amounts only to a circumstance on which to found the presumption of payment, and is not in itself a legal bar to the action. *Jackson v. Pierce*, 10 John., 417; *Bailey v. Jackson*, 16 John., 210; *McDowel v. Charles*, 6 John. Ch. R., 132.

In deciding *Norris v. Slaughter* and the present case on the statute of limitations, we have been mainly guided by the wholesome and familiar rule of law, that no statute should have a retrospect beyond the period of its commencement, and should never be so construed as to divest acquired rights. *Dash v. Van Kleeck*, 7 John., 477; *Sayre v. Wisner*, 8 Wend., 661; *Fairbanks v. Wood*, 17 *ib.*, 329; *Miller v. Whitaker*, 5 Hill, 408; *Culkins v. Calkins*, 3 Barbour, 306.

Judgment reversed.

Henry W. Starr, for plaintiff in error.

D. Rorer, for defendant.

WILE & FEAR v. MATHERSON.

Where a statute of limitations is pleaded, which cannot operate as a bar to the action, and a replication is filed, that one of the joint debtors had promised payment within six years, to which replication defendant demurred; it was held, that the demurrer related back to the first mistake in pleading, and that plaintiff was entitled to judgment on the demurrer.

ERROR TO DES MOINES DISTRICT COURT.

Opinion by KINNEY, J. This was an action brought by the defendant in error against the plaintiff in error, upon the record of a judgment from the supreme court of Cincinnati. The defendants pleaded, first, *nul tiel record*; and second, the statute of limitation.

The plaintiff replied in short to the first plea; and as to the second, sets up a promise of payment on the part of Fear, one of the defendants, within six years prior to the commencement of the suit. To the second replication as to the promise of payment, the defendants demurred. The demurrer was overruled and the defendants required to rejoin to the replication. They then withdrew the plea of *nul tiel record*, and having failed to rejoin to the plaintiff's replication to the second plea, a judgment was rendered against them; to reverse which, they sued out a writ of error, and assign the decision of the court, overruling their demurrer for error.

It was contended at some length in the argument, that a promise of one partner or joint debtor would not take the case out of the statute of limitations as to the co-partner or joint debtor, and hence that the demurrer to the replication to the plea of the statute of limitations, setting up a promise of one of the defendants, was improperly overruled.

The plea in this case was of no avail, according to the decisions of this court in the case of *Norris v. Slaughter*, 1 G. Greene, 338; and *Forsyth v. Ripley*.*

When the statute of limitations was set up by the plea as a defence, there was no such statute in force, and consequently could not be pleaded as a defence to the action. Various statutes of limitations had existed, but as the time prescribed for the limitation of actions had never run under any one of them, in consequence of their appeal, without a saving clause as to pre-existing contracts; and as the repealing statutes were not retroactive by express enactment, it was decided that these statutes could not apply to contracts which had run a part of the time under them as prior laws. Hence the plea in this case is bad; so also was the replication of the plaintiff, setting up a promise to pay by one of the defendants.

The defendants were legally bound to pay the debt with-

* Ante, 181.

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out such subsequent promise. As the debt was not barred, a promise to pay was unnecessary; as without it, the plaintiff was entitled to recover. The defendants, therefore, with a bad plea, demurred to a bad replication. The demurrer looks back to the plea, and if the plea was bad, they are not in a situation to object to a bad replication. The first fault in pleading having originated with them, they were not entitled to judgment upon the demurrer; as a bad replication was good enough for a bad plea.

The plea being bad, and the demurrer relating back to the first mistake in pleading, the plaintiff was entitled to a judgment, as the first error was committed by the defendants. *Barruss v. Maden*, 2 John., 145; *Bennett v. Irwin*, 3 *ib.*, 363; *Allen v. Cranford*, 7 Cow., 46; *United States v. Arthur et al.*, 5 Cranch, 257; 8 East., 442; 11 Johnson, 482, 583, 587. As the plea, therefore, in this case was bad, we think the court were right in rendering a judgment in favor of the plaintiff; and although that court may assign a wrong reason for the judgment, yet if the judgment is right, this court will not reverse.

In this view of the case, the question whether the promise of one joint debtor or joint partner will take the case out of the statute of limitations, as to the co-debtor or partner, cannot well be raised, and therefore cannot be decided.

Judgment affirmed.

J. C. Hall and D. Rorer, for plaintiffs in error.

Grimes and Starr, for defendant.

LEWIS v. SUTLIFF.

The second section of the attachment act, which authorizes an issue and jury trial of the facts upon which the attachment issued, is not repealed by the amendatory act of 1846.

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The certificate of a judge, that the transcript of a record is attested *in due form*, is authentic evidence of its correctness.

Where the certificate of a judge is not dated, but is preceded and followed by certificates of the clerk, the first dated on the 18th, and the other on the 31st of July, the defect is cured.

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. Levi Sutliff instituted an action of debt, on a judgment record, against Garry Lewis. After commencing suit, the plaintiff sued out a writ of attachment, and had it levied upon the real and personal property of the defendant. The defendant joined issue upon the facts and allegations contained in the affidavit on which the attachment issued, and demanded a trial of that issue by a jury, but the court refused the trial. To this ruling of the court, the defendant took exception. On the trial of the cause, the plaintiff offered in evidence to the jury a certified copy of a judgment rendered in the court of common pleas, for the county of Trumbull and state of Ohio, in his favor against the defendant. The admission of this record was objected to, on the ground of defective authentication; but the objection was overruled and the evidence admitted. Upon this evidence, the plaintiff obtained a verdict and judgment, with an order that the property attached be sold in satisfaction.

The decisions of the court in refusing a trial of the attachment issue, and in admitting the record as evidence, are assigned as error:

1. The second section of the act, allowing and regulating writs of attachment, provides that upon the return of any writ of attachment, "the defendant may join issue upon the facts and allegations set forth in the affidavit, on which the attachment is sued out; and thereupon said issue shall be tried by a jury," in like manner, as any other issue of fact is tried. Rev. Stat., 78. In January 1846, the first section of the statute regulating writs of attachment, was amended, by substituting a different class of requisites, to be alleged in the affidavit as preliminary to the

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issuing of the writ. But the substitution of this amendatory act is limited to the first section of the law first referred to, and in no way abrogates or contravenes the second section which authorizes an issue and jury trial. The law of 1846 repeals nothing in the act to which it is amendatory but the first and second class of requisites, which are designated in the first section, and does not even by implication militate against the right so wisely and justly extended to the defendant in the attachment of having the reasons for issuing the writ tested by investigation. An abuse of this stringent and oppressive process loudly demanded legislative interposition, when the second section was incorporated as a protection to debtors, against the persecuting avidity of creditors; and so far from impairing the shield of protection thus extended, the law of 1846 renders it more ample, by adding exemplary damages in an action on the attachment bond. We cannot, then, in any particular, approve the position assumed by counsel, that this act curtails the rights of a defendant in attachment proceedings; it rather extends to him additional security.

Entertaining, no doubt, that the right of the defendant to a trial of the attachment issue is still authorized by statute, the decision of the court refusing such trial, and ordering the sale of the property attached, to satisfy the judgment, is reversed.

2. The objections urged to the authentication of the record which was admitted in evidence, deserves a brief notice. The certificates attached are as follows:

“The State of Ohio, }
Trumbull County. } ss.

“I, Warren Young, clerk of the court of common pleas within and for said county of Trumbull and state of Ohio, certify that the foregoing is truly copied from the record of the proceedings of said court in the cause aforesaid.”

To this are appended the usual test, the date, seal and signature of the clerk in the usual form. The certificate of the clerk is followed by that of the judge, in these words:

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“I, B. F. Wade, president judge of the third judicial circuit of the court of common pleas, of the state of Ohio, in which said circuit said county of Trumbull is included, certify that Warren Young is clerk of said court and that his attestation is in due form of law.

B. F. WADE, *Pres. Judge.*”

The certificate of the clerk properly authenticated, and dated July 31, 1848, is appended to show that Benjamin F. Wade was presiding judge as above, and that the signature is genuine. But this certificate is a superfluous appendage. An examination of the various objections which counsel have ingeniously urged to these certificates, we cannot consider essential. The first certificate of the clerk sufficiently identifies the transcript to be a true copy of the record in the case. It contains all the averments which are usually adjudged material in such an authentication, and being followed by the certificate of the presiding judge that the attestation is *in due form of law*, the record is sufficiently authenticated to give it full faith and credit, under the act of Congress passed May 26, 1790. As decided by this court in *Young v. Thayer*, 1 G. Greene, 196, the certificate of a judge that the attestation is in due form, is authentic evidence of its correctness. In the present case, the certificate of the judge is defective in omitting the date, but that defect is cured by the certificates of the clerk preceding and following that of the judge. One is dated on the 18th, and the other on the 31st July, 1848; showing that the intermediate certificate of the judge was made between those dates.

The judgment of the district court rendered pursuant to the verdict is affirmed; but as the order relative to the attachment issue was erroneous, the defendant in error is adjudged to pay the costs of this court, and a *venire de novo* is ordered to determine the attachment issue.

D. Rorer, for plaintiff in error.

L. R. Reeves, for defendant.

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HUNER v. REEVES, *adm'r., &c.*

All co-parties to a judgment, who are entitled to a writ of error, must be joined as plaintiffs in the writ; and if either of them refuses to join, still, his name may be used by giving him a bond to indemnify him against damages and costs.

ERROR TO LEE DISTRICT COURT.

Opinion by KINNEY, J. A motion is made in this case by the attorney for the defendant in error, to dismiss the writ of error, for the reason that a bond was not given by Huner to his co-party Bullard, as required by the statute, when co-plaintiffs do not join in the writ. The statute provides: "That any one of two or more persons entitled to a writ of error, may sue out a writ of error as of course, in the name of the plaintiff in error. *Provided* such plaintiff in error shall have first filed a bond with the clerk of the district court, where the judgment or decree was rendered in such sum as the clerk shall require, with sufficient sureties to indemnify his co-plaintiff, against all damages and costs, on account of suing out such writ of error." Laws of 1845, p. 26, § 2.

Huner and Bullard were the defendants below. Huner alone feels aggrieved by the judgment, and sues out the writ in his own name. This he could not do, without joining his co-plaintiff, and if he had refused to join, he could still use his name in the writ of error, by giving him a bond to indemnify him against damages and costs in compliance with the statute.

Giving a bond to co-plaintiffs when they do not join in the writ of error, is made by the statute a condition precedent to the suing out of the writ, an imperative requirement which cannot be dispensed with. The laws prescribing the manner of suing out a writ of error by one party, where there are other parties who do not join in the writ, is inflexible, and unless pursued, or there is evidence of a waiver of the bond, this court will not take

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jurisdiction of the cause, and will on motion dismiss the writ.

As the writ was sued out in this case by Huner, without having first given the bond and joining Bullard, it must be dismissed. The bond being a condition precedent, we cannot now permit the plaintiff to file one, *nunc pro tunc*.

Motion granted.

J. C. Hall, for plaintiff in error.

L. R. Reeves, for defendant.

WRIGHT *et al.* v. PHILLIPS.

A motion for a nonsuit, on the ground of plaintiff's failure to appear, will not be granted, if plaintiff appears before the motion is decided.

Surveys made by the general government are public, and within the judicial knowledge of courts.

A justice of the peace may determine what townships are within his jurisdiction *ex officio*.

A substantial compliance with the statute, conferring and regulating the powers of justices of the peace, is all that should be required.

In an action of forcible entry and detainer, the jurisdiction of a justice is co-extensive with the county.

A verdict defective in form may be corrected by request or consent of the jurors at any time before they are dismissed and the verdict is recorded.

In a case taken to the district court by *certiorari*, an affirmance or a new judgment may be rendered "as the right of the matter may appear."

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. An action of forcible entry and detainer, commenced by John Phillips against Mitchell D. Wright and O. Gentry. It appears by the transcript that the summons was served upon the defendants and made returnable December 22, 1848, at 10 o'clock, A.M. At the time appointed, the defendants appeared and moved

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for a nonsuit, on the ground that the hour of trial¹ passed. This motion was overruled, and thereupon the defendants moved to dismiss the suit, alleging for cause that the complaint did not show that the premises sued for were within the township and county within which suit was brought. This motion was also overruled. The cause was then submitted to a jury, who returned a verdict in these words: "We the jury find for the plaintiff." This verdict was signed by all the jurors; but upon suggestion of the justice, it was put in the form provided by statute, and then signed by the foreman.

The case was taken to the district court, by writ of *certiorari*, and tried upon the errors assigned to the proceedings of the justice. In the district court it was decided in affirmance of the judgment of the justice, that the defendants unlawfully detained the premises of the plaintiff, as alleged in his complaint, and that restitution of the property should be made. The judgment contains a particular description of the land, in directing immediate possession thereof, to be restored to the plaintiff. To these proceedings various objections have been urged in this court:

1. It is alleged that the court below erred in not reversing the judgment of the justice for the errors assigned on *certiorari*. It is contended, that the justice should have granted a nonsuit on the application of the defendants. Upon this point we are informed by the returns of the justice, that "on the day of trial after the hour of eleven o'clock, the defendants appeared and asked for a nonsuit, which motion was still pending when the plaintiff appeared by his attorney." With the appearance of the plaintiff, the reason for the motion was removed, and it was very properly overruled. It is provided by statute that "if the plaintiff does not appear by himself, or agent, on the day of trial, he shall be nonsuited, and judgment entered against him for the costs." Rev. Stat., 347, § 13. But the plaintiff did appear, and that too before a decision of the motion was made. Under such circumstances

it would have been irregular to order a nonsuit. *Smith v. Crane*, 12 Vt., 487.

It is also contended, that the justice erroneously overruled the motion made against the sufficiency of the complaint, on the assumption that it contained no allegation that the premises lay in the township for which the justice was elected. The complaint is introduced by the following words: "Before L. B. Fleak, a justice of the peace in and for Jackson township, Lee county, Iowa." In the body of the complaint, the land is described as being "in said county, and known as the east half of the south-west quarter of section 24, township 65, range 5 west." We think the venue is sufficiently averred in the complaint, even if the jurisdiction of justices in such cases was limited to their respective townships. It virtually alleges the land to be in Lee county, and describes it by U. S. government surveys. These surveys are public and within the judicial knowledge of all our courts. That township 65, in range 5 west, is within Jackson township, in Lee county, is a matter which a justice of the peace of that county might well determine *ex officio*. It must be presumed that he knows the territorial extent of his own jurisdiction, and the lands therein, as designated by the public surveys. Under this view, we assume that the complaint is sufficient, even if tested by the technical rule, that the pleadings before inferior tribunals must show jurisdiction. But this rule is greatly relaxed in its application to justices of the peace. Their proceedings must necessarily be regarded with more indulgence and liberality. Nothing more should be required of them, than a substantial compliance with the statute, conferring and regulating their powers. The complaint in this case comes within the regulations of the act. Rev. Stat., 345, § 6.

There is a still stronger reason why the motion in question should not have prevailed. It is expressly provided by statute, that "the jurisdiction of justices of the peace shall be co-extensive with their respective counties."

Rev. Stat., 312, § 16. There is another section, it is true, requiring every action to be brought before a justice of the township wherein the defendant resides, or wherein the plaintiff resides and the defendant may be found. Rev. Stat., 314, § 31. To this limitation, however, there are several exceptions, even in the three sections immediately following the one in which the limitation is established; and on page 345, § 5, actions of forcible entry and detainer, and of unlawful detainer, "are made cognizable before any justice of the peace of the county in which the offences may be committed." The section last referred to applies exclusively to actions of forcible entry and detainer, and unlawful detainer, and makes those actions an exception to the township restraint, enacted in the preceding sections, by expressly providing that any justice of the peace in the county shall have cognizance of such actions. The jurisdiction of justices being co-extensive with the county in this proceeding, and the complaint designating the premises as being within the appropriate county, it averred in that particular all that was necessary.

The next objection is in relation to the verdict. It appears that it was not returned in the form provided by law. The justice informed the jurors of the fact, and they then requested him to write one in due form. He did so, and it was signed by their foreman. Though corrected in form, it was not changed in substance; nor was it even corrected without the consent of the jury. Upon this point, the amended return of the justice shows, that when the jurors returned with their verdict, he informed them that it was not in proper form, and therefore they requested him to draw up such a verdict as the case required. The amended verdict was prepared at the request of the jurors, and by the signature of their foreman was virtually adopted by them, and thus became as much their verdict, as if it had been written by one of their own number. The proceeding was proper. It was the duty of the justice to advise the jurors in relation to the forms provided by law; to admonish them of any apparent defects, and direct their

correction. If this duty could be more generally performed by justices, much less irregularity, injustice and delay would result from their proceedings.

It is not an unusual practice for courts to direct imperfect verdicts to be corrected. They are not final until pronounced in open court, and entered upon its record or docket. Corrections and alterations may be made by the jurors, at any time before they are dismissed, and before their verdict is recorded. *Root v. Sherwood*, 6 John., 68; *Blackley v. Sheldon*, 7 *ib.*, 32; *The State v. Underwood*, 2 Ala., 744; *Ward v. Bailey*, 10 Shep., 316; *Tarlton v. Briscoe*, 1 A. K. Marsh., 67

By many courts it has been determined, that any informality in a verdict may be corrected even after the jury are discharged. In *Foster v. Caldwell*, 18 Vt., (3 Washb.) 176, upon an issue in assumpsit a verdict of "guilty" was returned, and after the jury were discharged the court permitted the verdict to be amended, by striking out the word "guilty," and inserting "did assume and promise." This in the supreme court of that state was held to be correct. If such an alteration may be correctly made after the jury are dispersed, the propriety of the amended verdict in the present case cannot be questioned. It is not a more material departure from the original return, and it appears, besides, to have been made by the direction and consent of the jury before they were discharged.

In our territorial supreme court, it was decided, that though a verdict cannot be changed in meaning, it may be altered in form, without the consent of the jury, even after they have separated. *Gordon v. Higley*, Morris, 13.

We conclude, then, that the district court did not err in refusing to reverse the judgment of the justice for the errors urged on *certiorari*.

2. The second error assigned in this court is, that the court below rendered an original judgment instead of affirming that of the justice. The power of the district court over judgments of justices is not confined to a mere affirmance or reversal of their decisions; but a decision

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is to be given "as the right of the matter may appear." It "may affirm or reverse the judgment in whole or in part, and may issue executions as in other judgments rendered before said court." Rev. Stat., 337, § 5. The judgment of the district court is virtually an affirmance of the proceedings, according to "the right of the matter," as it appeared of record. It in no way conflicted with the verdict and judgment of the justice; but in pursuance of them, a more formal and specific judgment was rendered, which might be enforced, and from which a writ of restitution and execution might issue. This, we think, was done within the legitimate authority of the court, and within the letter of the statute.

Judgment affirmed.

J. C. Hall, for plaintiffs in error.

L. R. Reeves, for defendant.



KERR v. LEIGHTON.

Two contiguous quarter sections of land may be regarded as one entire tract or possession.

The "act to allow and regulate the action of right" provides a remedy to recover the possession of land, and also a remedy to determine the title.

To enable the plaintiff to recover in an action of right, it should appear that the defendant acted as owner, landlord or tenant of the property claimed; and if as tenant that he was in possession.

Where the defendant pleads to an action of right, in the form provided by statute, he virtually admits himself in possession. As possession is not denied by such a plea, it need not be proved.

If plaintiff seeks to recover more than nominal damages for withholding the premises in an action of right, proof of the time and circumstances becomes essential.

The judgment of a court of competent and general jurisdiction cannot be collaterally assailed.

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. This was an action of right instituted by William Leighton against Alexander Kerr. In the declaration, the plaintiff claimed right to the immediate possession of the north-east quarter of section 9, and the north-west quarter of section 10, in township 65 north, of range 5 west, of the 5th principal meridian. This land comprises a portion of the half-breed tract in Lee county. The cause was submitted to a jury under the general issue and a verdict returned finding the right of the property to be in the plaintiff below. He appears to have derived title to the land in question from Antoine Leclaire. In order to establish Leclaire's title, and right to convey the premises, the partition record of the half-breed reservation was admitted in evidence. Several questions were raised against the admissibility of this record; but as the same questions were adjudicated and decided in *Wright v. Marsh, Lee & Delavan*,* it is unnecessary to consider them here. We will therefore entertain such points only as were not acted upon in that case.

1. It is urged as error that the court instructed the jury that "if they found from the evidence that said defendant was in possession of the land, or any portion of the land described in plaintiff's declaration, that was sufficient to entitle the plaintiff to recover the whole, so far as the question of possession is concerned;" and also in refusing to instruct the jury that, unless they find from the evidence that at the commencement of this suit the defendant was in possession of said north-west quarter section or claimed the same, as owner and landlord, they will find for the defendant to the extent of such north-west quarter.

The objection to the instruction given, and to the in-

* Ante, 94.

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struction refused, contemplates that the two quarter sections of land described in the declaration are separate and distinct tracts, and that proving possession of one does not establish possession of the other, as a portion of the same body of land. But it does not follow that land is in separate and different parcels which is comprised in different quarters or in different sections. It may be one complete tract, one entire plantation or possession, though embraced in several sections, or even in different townships. A possession is not necessarily limited to one subdivision of land. If so limited, no one possession could extend beyond the smallest legal subdivision; even an eighty acre lot would be regarded as separate portions of land, because embracing two distinct subdivisions as regulated by law of Congress. But it is conceded by the counsel urging error, that a quarter section may be treated as one parcel of land. If a quarter section may be so regarded, why not a half section, or a whole section? In the present case the declaration claims "a tract of land with the appurtenances," designates two quarter sections as composing that tract, and refers to them as a property to which the plaintiff has immediate right of possession. Besides, the two quarter sections lie contiguous to each other. They are no way separated by other lands or possessions, and cannot therefore be considered separate portions. Evidence of possession then would extend to both quarter sections.

But it is contended by counsel for the defendant in error, that it was not necessary for the demandant below to prove that the defendant was in possession of the property claimed, in order to recover. The "act to allow and regulate the action of right," (Rev. Stat.,) 626, enlarges upon the common law writ of right. It supersedes the action of ejectment, (§ 20,) and furnishes within its ample provisions an adequate remedy for mere possessory rights, and also to establish actual seizin, or inheritance in lands. The first section declares, "that hereafter the

proper remedy for recovering any interest in lands, tenements or hereditaments shall be by an action of right." The fourth section provides, that "the action may be brought against any person acting as owner, landlord or tenant of the property claimed." It appears, then, that the action may be brought against persons not in possession of the premises; against him who acts as owner or landlord,—and a person may act in either of these capacities without being in possession. The defendant may even be a non-resident of the county in which the property is situated. Rev. Stat., p. 527, §§ 8, 9, 11.

To enable the plaintiff to recover in this action, it should appear by evidence, or by the pleadings, that the defendant acted as owner, landlord or tenant of the property claimed; and if as tenant, it should appear that he was in possession of the premises at the commencement of the suit; for, in this particular, the action is assimilated to that of ejectment.

Where the defendant pleads to the merits in the form provided by statute, he denies the right of the plaintiff to the land, and to damages for its detention. He virtually confesses possession by this plea, but seeks to avoid damages by denying the plaintiff's right to the premises. As the plea joins the *mise* or issue upon the right of possession, or actual seizin of the property, possession need not be proved because it is not denied.

If, however, the plaintiff seeks to recover more than nominal damages for withholding the premises, proof of the time and circumstances of the detention becomes essential.

2. As another objection to the proceedings below, the plaintiff in error complains that he was not permitted to show fraud and collusion in the judgment of partition, under which the defendant in error deduced title. This evidence was, we think, very properly excluded. That a judgment emanating from a court of competent and gene-

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ral jurisdiction cannot be collaterally assailed, we have already decided in the case of *Wright v. Marsh, Lee & Delavan*; * and such a judgment is removed even beyond the collateral imputation of fraud. *Webster v. Reid, Morris*, 467.

Judgment affirmed.

Geo. C. Dixon, for plaintiff in error.

H. T. Reid, for defendant.

* *Ante*, 94.

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT OF THE STATE OF IOWA,

OTTUMWA, JUNE TERM, A.D. 1849,

In the Third Year of the State.

Present:

HON. JOSEPH WILLIAMS, *Chief Justice.*
HON. JOHN F. KINNEY, } *Judges.*
HON. GEO. GREENE, }

HARROW *et al.* v. BAKER *et al.*

In an action of forcible entry and detainer, proof that the party in possession was frightened by threats, or other circumstances, to yield his possession to the defendant, is sufficient to show that the entry was forcible. Threats that induce fear of forcible entry and ouster, without fear of personal violence, are sufficient to establish a forcible entry.

ERROR TO DAVIS DISTRICT COURT.

Opinion by KINNEY, J. This was an action of forcible entry and detainer, commenced before a justice of the peace. Judgment was rendered against the defendants in error before the justice. The case was appealed to the district court, and judgment in the district court was obtained against the plaintiffs in error, to reverse which he brings this writ of error. The plaintiffs assign for error:

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1. The court erred in charging the jury, that threats to dispossess by force, did not amount to forcible entry.

2. The court erred in charging the jury, that if Harrow left from fear produced by threats and superior numbers, it should be fear of personal violence to himself or family, and not merely fear that a forcible entry and ouster would be made.

It appears from the bill of exceptions, that the plaintiffs in error were the lessees of Agnes Baker, of a farm and dwelling-house in Wapello county, of which she wished to obtain possession. She went to the house on Sunday morning, and requested Harrow, who was then the sole occupant, to leave, which he appeared willing to do as soon as he could find another place, and offered to give up one room in which to place her goods. Agnes Baker then left, and returned in the afternoon with one Chapman, and about thirty other men, who expressed to Harrow a determination that he should leave immediately, or they would dispossess him by force. They gave him until twelve o'clock at noon the next day, declaring, that if he did not leave by that time, they would put him out. Harrow agreed to be out by the next day.

It seems that at the time appointed, Agnes Baker, Chapman, and the crowd again assembled at the house, bringing the household goods of Agnes, for the purpose of putting her in possession, and removing Harrow, if still there. A portion of Harrow's goods were out of the house, and the crowd assisted in removing the remainder, and putting those of Agnes Baker in. It appears that Harrow resisted putting in the goods of Baker. This is the evidence upon which the instructions of the court were predicated.

The court charged the jury, that threats to dispossess by force did not amount to forcible entry. If Harrow left from fear produced by threats and superior numbers, it should be fear of personal violence to himself or family, and not merely fear that a forcible entry and ouster would be made. The court also instructed the jury, that he who

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abandons his possession to avoid being turned out by force uninjured, is not forcibly dispossessed, &c. Other instructions were given; but if in these the court erred, it will not be necessary to go further, particularly as these were applicable to the state of facts upon the trial.

The Rev. Stat., 345, § 2, clearly defines what shall constitute forcible entry and detainer. It provides, "that if any person shall, by such words or actions as have a natural tendency to excite fear or apprehension of danger, or by putting out of doors or carrying away the goods of the party in possession, or by entering peaceably and then turning out by force, or frightening by threats or *other circumstances of terror*, the party to yield possession, in such case every person so offending shall be deemed guilty of a forcible entry and detainer, within the meaning of this act."

This statute is very comprehensive, and under it this action can be maintained where actual physical force is not used in the entry and detainer. If the party in possession is frightened, by threats or other circumstances of terror, to yield his possession to another, the entry is forcible.

In England, proceedings of this kind are either by indictment, or by a complaint before a justice of the peace, in the nature of a criminal prosecution. That which by their law is made an offence punishable by fine and imprisonment, is by ours a civil action to obtain possession; and hence a resort to intimidation and threats, accompanied with an array of force and power to obtain possession of premises, which, although wrongfully withheld, ought to be regarded by the courts with great disfavor. If Harrow was holding over without color of right, the party entitled to possession had a remedy at law. But in lieu of invoking the law for assistance and relief, she resorts to the strong arm of physical force, and in this manner obtains possession.

But, did the court err in instructing the jury that threats to dispossess by force did not amount to a forcible

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entry, &c. ? By the English authorities these instructions may have been correct. But we think, under our statute giving the remedy in cases where force or personal violence were not actually used, and thus saving the necessity of a personal conflict before the right of action could accrue, that the instructions are erroneous.

The statute of Illinois provides, "that if any person shall make entry into lands, tenements or other possessions, except where entry is given by law, or shall make any such entry by *force*," &c. This statute declares that the entry shall be by *force*, without any qualification, and yet it was held under this statute, by the supreme court, that if the entry was wrongful, and without lawful right, that actual force and physical violence were not necessary to sustain the action. *Atkinson v. Lester*, 1 Scam., 407.

In the case of *The State v. Pollock*, 4 Iredell's R., 305, it was held, that "where a party entering upon land in the possession of another, either by his behaviour or speech gives those who are in possession just cause to fear that he will do them some bodily harm if they do not give way to him, his entry is esteemed forcible." The English doctrine that force was necessary, does not appear to be regarded as essential in this case. We are not aware of the provisions of the statute under which this decision was made.

But by our statute, the right of action may be complete in the absence of all force. Any circumstance of terror, which will induce the party to yield possession, is all that is necessary. Threats which would have a tendency to excite fear, not of personal violence alone, but reasonable fear of a violent *ouster* of the goods of the person in possession, we think, under our statute, will enable the party dispossessed by such fear to recover possession in an action of forcible entry and detainer. This is the only fair and legal construction that can be given to this statute, and such a one as we think was intended by the legislature, thereby preventing persons from resorting in a rude,

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violent and lawless manner, to a remedy fraught with such dangerous consequences.

The court therefore erred in charging the jury, that if Harrow left from fear produced by threats and superior numbers, it should be fear of personal violence to himself or family, and not merely fear that a forcible entry and *ouster* would be made; as also in the instruction that he who abandons his possession to avoid being turned out by force, uninjured, is not forcibly dispossessed. It is not necessary that a person should wait until he is actually turned out by force, before his right of action is complete.

Judgment reversed.

J. C. Hall, Wright and Knapp, for plaintiff in error.

S. W. Summers and Geo. May, for defendant.



WILEY v. SHOEMAK.

If evidence is adduced which tends even remotely to prove facts, which, if established, would support the action, a nonsuit should not be granted.

If a verdict for the plaintiff would be clearly against the weight and legal effect of the evidence, a nonsuit may be ordered.

A motion to nonsuit plaintiff after evidence is submitted, is in the nature of a demurrer to evidence.

A nonsuit should not be granted without the consent of plaintiff, unless the evidence is entirely irrelevant, or has no bearing upon a material point, without proof of which a verdict could not be supported.

After a note for a certain sum, payable in flour, is due, it becomes a cash note, and a demand of payment is not necessary.

ERROR TO JEFFERSON DISTRICT COURT.

Opinion by GREENE, J. This case was taken by appeal from a justice of the peace to the district court. On the trial in that court, a promissory note made by Abner Wiley, and payable to John Shoemak in flour, at the Fair-

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field prices, was read in evidence. The plaintiff proved that he demanded the flour about the time suit was commenced, and rested his case; and thereupon the defendant moved to nonsuit the plaintiff, which the court refused. Verdict and judgment for the plaintiff.

Two questions are submitted to our determination:

1. Did the court err in overruling the motion to nonsuit the plaintiff?

To this we give an unqualified answer in the negative. Even assuming the supposition that the plaintiff had not adduced sufficient evidence to make out his case conclusively, it would still have been improper to grant the motion, and thus preclude the action of the jury upon the question at issue. The sufficiency of the testimony, in proving the demand, could only be passed upon legitimately by the jury; and the legal effect of such proof would come properly under the determination of the court.

Wilkinson v. Scott, 17 Mas., 249. This rule must especially obtain under the statute of our state, as shown by former decisions of this court. And it is a doctrine that should be recognized wherever the right of trial by jury is held sacred, that when the evidence tends, although remotely, to show facts, which, if established, would support the action, a nonsuit ought not to be ordered, but the case should be submitted to the jury. This is conceded even in Maine, where arbitrary nonsuits, *per curiam*, appear to be most in vogue. *Foster v. Dixfield*, 6 Shep., 380. On this point, see also *Barlow v. Brands*, 3 Green, N. J., 248; *Adams v. Tiernan*, 5 Dana, 394; *Taylor v. White*, 2 Monr., 94; *Davis v. Hoxey*, 1 Scam., 406. But if a verdict for the plaintiff would be against the clear weight and effect of the evidence, a nonsuit may be ordered. *Rudd v. Davis*, 7 Hill, 529; 3 *ib.*, 287. This must necessarily follow from the character of the motion to nonsuit the plaintiff. It is like a demurrer to evidence, and admits all the facts to be proved, upon which the evidence bears. If all the facts adverted to by the proof are not sufficient to sustain the action at law, a nonsuit could properly be awarded by the court.

Gregory v. Nesbit, 5 Dana, 419; *Curle v. Beers*, 3 J. J. Marsh., 170. In the present case, it is conceded, that the only fact requiring proof was the demand, and that at least could be rationally inferred from the evidence; hence the court acted properly in refusing the nonsuit.

Again, it is a well recognized rule of law, that a nonsuit cannot be ordered by the court without the consent of the plaintiff. *De Wolfe v. Raband*, 1 Pet., 447; *Dove v. Grymes*, *ib.*, 469; *Crane v. Morris*, 6 *ib.*, 598; *Mitchell v. New England Marine Insurance Company*, 6 Pick., 117; *Hunt v. Stewart*, 7 Ala., 525; *Martin v. Webb*, 5 Pike, 72; *St. Louis Floating Dock Ins. Co.*, 8 Mo., 625; *Wells v. Goty*, *ib.*, 681; *Smith v. Crane*, 12 Vt., 487; *Booe v. Davis*, 5 Blackf., 115; *Irving v. Sargent*, 1 S. & R., 360; *Rogers v. Muddlen*, 2 Bailey, 321. This we deem the safest practice; still it is not unusual for courts to entertain the power of ordering a nonsuit, regardless of plaintiff's acquiescence, when the evidence is entirely irrelevant, and has no legitimate bearing upon the issue or upon a material point, without proof of which a verdict could not be supported. *Clason v. Bird*, 2 Brev. S. C., 370; *Pratt v. Hull*, 13 Johns., 334; *Foot v. Sabin*, 19 *ib.*, 159; *Heally v. Utley*, 1 Cowen, 353. But even in these cases, it is conceded that, if any fact is in dispute or doubt, the matter should abide the verdict of a jury. It is only when there is an entire failure of evidence to establish any one essential averment, that the court should direct the plaintiff to be nonsuited. 1 Starkie's Ev., 400.

2. Was a demand of the flour necessary at law? Clearly not. The note was made payable one day after date, in flour. When due, it became to the holder the same as a cash note, possessing like negotiable qualities, and subject to like liabilities and remedies.

In *Church v. Feterow*, 2 Penn., 301, it was held that when a note is given for the payment of a certain sum, in furniture or other specific articles, within a stated time, the payer has an election to satisfy the note, in such specific articles or in money, until the day of payment, but after

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that day is past, his election is gone, and the payee's right to demand money becomes absolute. So also in *Stewart v. Donelly*, 4 Yerg., 177; *Saunders v. Richardson*, 2 Sm. & Marsh., 90; *Orr v. Williams*, 5 Humph., 423; *Lawrence v. Dougherty*, 5 Yerg., 435; *Miller v. McClain*, 10 *ib.*, 245; *Vanhooser v. Logan*, 3 Scam., 389; *Plowman v. Riddle*, 7 Ala., 775. And in New York it has been decided, that a note for a certain sum payable in property may be given in evidence under the money counts. *Smith v. Smith*, 2 John., 235.

In the case at bar, the note had been some time due before suit was commenced, and thereupon became payable in cash; a demand of the flour was not necessary to enable the holder to recover. It was held in *Elkins v. Parkhurst*, 17 Vt., 105, that when a note is payable in specific articles on a day certain, no demand is necessary before bringing suit.

Thus viewing these authorities, and not regarding the case of *Wyatt v. Bailey*, Morris, 396, as analogous, we can see no error in the proceeding below.

Judgment affirmed.

Slagle and Achison, for plaintiff in error.

Charles Negus, for defendant.



LUCAS v. CASSADAY.

Where execution returns show that sufficient property was levied upon and appraised to satisfy the judgment, the constable who made the levy and return is not a competent witness to prove that the execution was not satisfied by the levy.

After levy by execution on goods and chattels, sufficient to satisfy the judgment, the defendant in the execution is divested of his right to the property; and the officer making the levy becomes liable to the plaintiff for

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the debt if he fail to perform his duty according to the requirements of law, or be released by the plaintiff.

After a return by the officer that property sufficient to satisfy the judgment has been levied on, the defendant in the execution is, *prima facie*, discharged from the debt.

In a trial before a probate court, to charge an estate with an old judgment which is claimed to have been satisfied by a levy of property, proof is admissible to show that one of the defendants in the judgment was a security, and that the principal became insolvent after his property was levied upon to satisfy the judgment.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by WILLIAMS, C. J. This case came up by appeal from the decision of the probate court of Van Buren county. The facts of the case appear in the bill of exceptions. John Lucas, assignee of William Willis, brought his suit against David Cassaday and William Cassaday, on a promissory note drawn in favor of said Willis, for \$25 payable in pork, at the customary price, to be delivered at Keosauqua, on or before the 25th day of December, 1844. The note bears date September 15, 1844. On the 24th of October, 1844, the note was assigned by indorsement in writing by said Willis to John Lucas. On the 28th day of May, 1845, suit to enforce the payment of the note was instituted by Lucas against the payers, before a justice of the peace, and judgment by default was rendered against the defendants, for the sum of \$25 with interest and costs of suit. Upon this judgment an execution was issued on the 9th day of June, 1845, and put into the hands of a constable, and returned with the following indorsed as his return thereon: "Not satisfied, one wagon held under execution appraised at \$50." On the 27th of April, 1846, another execution was issued and returned by same constable, "Not satisfied." On the 26th of April, 1847, another execution was issued and put into the hands of a constable, and by him returned on the 22d of May, "No property found." This being the statement of the facts of the case as presented to the district court, from the

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record of the justice of the peace, the plaintiffs in the next place offered to introduce the parole evidence of Richard B. Abernethy, the constable, who took the wagon on the first execution, as appeared by his return, to prove that he had re-delivered the wagon, levied on, to the defendant, without satisfaction of the same or any part thereof. The defendant's counsel objected to this witness, as incompetent, on the ground that he could not be allowed, by his own testimony, to throw the debt upon the defendant and thus discharge himself from liability to pay the plaintiff's debt: or from accounting for the wagon with which, by his official return, he now stands legally charged; and claims that the official return of the constable could not be thus contradicted. The court refused to allow the witness to testify as offered. To this ruling of the court the counsel for the plaintiff excepted, and thereupon rested his case. The defendant's counsel then offered to prove on his part that William Cassaday, deceased, and whose administrators are defendants in this suit, was the security of David Cassaday, who died since the making of the note sued on, and that his estate is insolvent, and that the plaintiff knew this fact; and also that the wagon levied on was the property of said David, which fact the plaintiff also knew. To this evidence plaintiff's attorney objected. The objection was overruled by the court, on the ground that this was a proceeding in the probate court, under the intestate laws, and of such a nature "that any defence, either at law or in equity, might be set up to defeat his claim." The evidence was therefore received, and tended to prove said facts. To this ruling of the court the plaintiff's counsel excepted. The case was submitted to the court without a jury by agreement. The court found the facts to be as stated in the transcript of the justice and the return of the probate court, and held that the wagon taken on execution, being of sufficient value to satisfy the judgment, and no account having been given of the disposal made of it, that the judgment was, *prima facie*, satisfied, and gave judgment

for the defendant; to which the plaintiff's counsel excepted. The following errors were assigned:

1. "The district court erred in excluding the testimony of Richard B. Abernethy, a witness offered on the part of the plaintiff."

2. "The district court decided that the returns of the constable, mentioned in the justice's transcript, were, *prima facie*, evidence of the satisfaction of the judgment; and refused to permit plaintiff to explain the returns aforesaid by other testimony."

3. "The district court permitted proof that one of said defendants was security, and that the principal was insolvent, as set forth in the bill of exceptions."

The first error assigned is predicated upon the fact, that Abernethy the constable, who took the wagon of the defendant as a levy on the execution to satisfy the plaintiff, was a competent witness to make the estate of William Cassaday amenable in law, for the payment of the claim or debt of the plaintiff, on the judgment upon which this proceeding was instituted. Was he a disinterested witness, and on this score competent to testify for the purpose proposed? We think he was not. It appears by the record of the justice before whom the judgment was obtained, that he was the constable into whose hands the execution was put; that he proceeded in the performance of his official duty so far as to make a levy on a wagon, the property of David Cassaday, one of the defendants in the execution. Here his official proceedings, so far as the proper disposal of the property levied on is concerned, ceases; except that by his returns it appears that the property seized on execution was appraised at \$50, which sum was amply sufficient to satisfy the execution. It is true, that after the lapse of nearly a year, another execution was put into his hands, and by him returned, "Not satisfied;" and that one year after this last return, a third execution was issued to his successor in office and returned, "No property found." The returns do not show what disposal was made by him of the pro-

Lucas v. Cassaday.

perty of the defendant, which by his return was legally in his hands, to be appropriated to the satisfaction of the judgment of the plaintiff, for whom by virtue of law he acted officially, and to whom he stood accountable for the faithful performance of his duty as constable. Rev. Stat., 330, §§ 2, 4; Laws of 1844, 44. The constable was bound to proceed in accordance with law, without delay or neglect of duty, to make the money on the execution to satisfy the debt of the plaintiff, by levy on the goods and chattels of the defendant, and having made the levy, he becomes answerable to the plaintiff for the avails, unless he be released by the plaintiff's own act, or can show that he has disposed of it in due course of law. The facts in this case clearly show that the property taken in execution by him was sufficient to pay the full amount of the judgment, and that he, by failing to account for the property levied, became liable to the plaintiff in execution, on his official bond. In 4 Mass., 402, Chief Justice Parsons says: "When goods sufficient to satisfy the judgment are levied or seized on a *fi. fa.* the debtor is discharged, even if the sheriff waste the goods or misapply the money arising from the sale, or does not return his execution. For, by lawful seizure, the debtor has lost his property in the goods." For the like doctrine, see Minot's Digest, 320. And as to the effect of a levy by execution, see 6 Ohio, 490, and Laws of 1844, p. 46, § 4. A uniform concurrence of decisions by the courts of our country will be found to establish fully the doctrine, that after levy by execution, made on goods and chattels, sufficient to satisfy the judgment, the defendant in the execution is divested of his right to the property, and the officer making the levy becomes liable to the plaintiff for the debt, if he fail to perform his duty according to the requirements of the law, or be not released by the plaintiff. It matters not, in this case, whether this levy was made under the appraisement law or not. In either state of the case, the constable has clearly failed to show, by any legal means whatever, how he has disposed of the levy. To allow the

constable, two years after making his return officially, to come in as a witness for the plaintiff in execution, and by his evidence contradict, or explain away his return, to procure the payment of the indebtedness out of the effects of the defendant's estate, would be subversive of the plainest principles of justice and in violation of the law of evidence. Persons holding places of public and legal trust should be held to a faithful performance of their duty. We consider that the district court, by excluding the witness, as offered in the case at bar, ruled correctly.

As to the second assignment of error, we have already said enough on the question involved in the first, to dispose of this. The ruling of the court below, deciding that the return of the constable was, *prima facie*, evidence of the satisfaction of the judgment, so far as the defendant is concerned, we think, has been shown to be correct in law. The same principles of law are involved in the questions presented by both assignments, and they depend upon the same facts. The constable having seized the defendant's property by virtue of the execution, and returned the levy so made as sufficient to pay the plaintiff's judgment, the defendant thereby lost his property in the wagon levied on, and clearly he was, *prima facie*, discharged from the debt. The court decided correctly in refusing to allow the plaintiff, by the testimony that was offered, to explain away the legal effect of his official return to the execution.

The third assignment of error complains of the ruling of the district court, in permitting the defendant to show by evidence that the defendant, whose estate the plaintiff in this proceeding seeks to charge with the payment of this debt, was not the principal, but merely the security in the original contract; and that the principal therein died insolvent after the levy was made.

This being a proceeding under the intestate laws, we cannot discover anything erroneous in this ruling of the court below. The action of the court, in this matter, was, we think, in accordance with the provisions of the law,

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defining the jurisdictional power of probate courts in this state. In this proceeding, the defendant might avail himself of any defence proper in law or equity. The evidence admitted by the court, we think, might tend to establish a release from the claim of indebtedness, as set up by the plaintiff. But the bill of exceptions expressly shows that this cause was submitted to the court, without the intervention of a jury by agreement; and the judge there states that the decision and judgment rendered by the district court was founded on the transcript there referred to, and of record in the case, without reference to anything else. We can see nothing under this assignment to warrant us in reversing the judgment.

Judgment affirmed.

Jas. H. Cowles, for plaintiffs in error.

A. Hall, for defendant.



BRADLEY *et al.* v. McCALL.

If the plaintiff in an attachment suit before a justice of the peace recovers a judgment for less than five dollars, it does not follow that he is liable on the attachment bond.

In an attachment suit before a justice, the demand cannot be less than five dollars, but the judgment may.

ERROR TO WAPELLO DISTRICT COURT.

Opinion by KINNEY, J. This was an action brought in the district court of Wapello county, upon an attachment bond filed before a justice of the peace. Judgment was rendered upon the bond, and the case having been transferred to this court, the record presents the following facts: It appears, that in the original proceeding before the justice of the peace, an attachment was sued out upon the

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affidavit of Bradley, alleging that, after all just set-offs, McCall was indebted to him more than \$5. Judgment upon the trial was rendered in favor of the plaintiff for only 70 cents; and the suit in the district court, it seems, was instituted by McCall against Bradley and Mason, (the latter being surety upon the attachment bond.) upon the ground that as the plaintiff in the attachment did not recover \$5, he was entitled to damages for the suing out of the attachment. This appears to be the only question in the case entitled to consideration. The 1st section of the attachment law, page 339, provides that "creditors whose demands are not more than fifty nor less than five dollars, may sue their debtors by attachment before a justice of the peace in certain cases." The 2d section provides, that the creditor shall execute to the debtor a bond with sufficient security in a penalty of \$100, conditioned to pay the debtor all damages and costs which he may sustain by reason of the issuing of such attachment, *if the creditor fail to recover judgment thereon*, and if such judgment be recovered, that such creditor will pay the debtor all the moneys which shall be recovered by him, from any property levied upon and sold under such attachment, over and above the amount of such judgment and interests and costs thereon. This is the condition of the bond which the statute requires of the creditor for the safety and protection of the debtor; and upon a breach of which an action will accrue thereon to the defendant. The bond, it will be observed, is susceptible of two divisions or conditions, and upon a breach of either, the creditor will become liable to the debtor. 1. If the creditor does not obtain judgment; and 2. If he fail to pay over the surplus money arising from the sale of the property attached, after paying his own demand and costs. Unless there is a breach in one of these conditions, we are at a loss to know how the creditor would become liable to the debtor upon the bond.

The suit then having been brought upon the bond, and the debtor having recovered against the creditor and his

surety, we will examine the bill of exceptions and record to ascertain the basis of that recovery.

Upon the trial in the district court, the bond was introduced and read to the jury as the foundation of the action. The plaintiff below then introduced the transcript of the justice of the peace, which showed the recovery by the defendant of 70 cents. These items of evidence were objected to by the defendant, but permitted to go to the jury by the court, and enabled the plaintiff to recover.

The court charged the jury that the defendant Bradley, having failed to recover \$5 on his attachment, the defendants were liable on their bond if any damages were proved; for \$5, being the least sum for which a justice has jurisdiction by attachment, a judgment for a less sum is void for the want of jurisdiction in the justice. And therefore, as no judgment was ever obtained on the attachment, they should inquire what damages, if any, were sustained by the plaintiff by reason of his corn being held by the writ.

The court in this charge to the jury, appears to have predicated the instructions in favor of the plaintiff's right of recovery, entirely upon the fact that the judgment recovered before the justice was under \$5. This instruction we think erroneous. It will be observed, that the statute requires that the plaintiff's demand shall be at least \$5. Can this, by any reasonable construction or legal intendment, refer to the judgment?

This becomes an important inquiry, as the plaintiff recovered upon the supposed breach of the bond. As the justice had no power to render the judgment, it was therefore void, and placed the plaintiff in the attachment under the same liabilities to the defendant as if he had failed to obtain any judgment at all. By the express provision of the statute, the justice obtains jurisdiction when the *demand* of the creditor properly sworn to, &c., is \$5. Having obtained jurisdiction, he can render judgment, although this demand may be reduced by an investigation and trial. The object of the statute, undoubtedly, is to

guard and protect debtors from a violent proceeding by attachment, when the demand is of a less sum than \$5. But the creditor, when he makes his affidavit, and brings himself within the purview of the statute, does all that is required of him; and if for the want of testimony to sustain his demand, or if it be reduced by unexpected set-offs to a sum less than is sworn to, we think the justice, having legally obtained jurisdiction, may by reason of his general powers render a judgment, although that judgment should fall under the amount sworn to be due. As the statute has reference only to the *demand*, and not to the judgment, and as under the law defining the powers and duties of justices of the peace, they have power to render judgments in any sum not exceeding \$50, we cannot escape the conclusion that, in cases of attachment, justices of the peace may render judgment for a less sum than \$5.

As the instructions upon this point to the jury were erroneous, and probably formed the basis of the recovery, it will be unnecessary to notice the other questions presented by the bill of exceptions and assignment of errors.

Judgment reversed.

J. H. Cowles, for plaintiffs in error.

S. W. Summers, for defendant.

RICHARDS v. MARSHMAN.

Only that portion of a contract is void which promises more interest than is authorized by the interest law of 1839.

On a note made under that law to draw thirty-three per cent. interest, twenty per cent. interest can be enforced.

The payee of a note, which he indorsed to the holder, is a competent witness to prove usurious interest.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by GREENE, J. Assumpsit on four promissory notes made by the defendant and others, payable to Silas Tolman, and by him indorsed and delivered to Seth Richards. The notes are dated September 27, 1842, payable on or before the 28th day of June, 1843; and drawn to bear interest at the rate of 20 per cent. per annum after due till paid. Pleas, non assumpsit and usury.

On the trial, there was evidence given tending to sustain the plea of usury, and to show that Osse Tolman, one of the makers of the notes, borrowed money of the plaintiff and gave him surety notes drawing interest at the rate of 33 per cent.; and that the notes sued on were given for the principal and illegal interest of those notes, for the purpose of renewing them.

The court instructed the jury, that if one promises to pay another a sum of money including a greater rate of interest than is authorized by law, such promise would be void, and the case would stand as if no such promise had been made by the parties; but the law would then imply a promise to repay the consideration with *six* per cent. interest. The jury accordingly found for the plaintiff, on such implied promise.

This instruction of the court is one of the errors urged.

The interest act of 1839, p. 276, was in force at the time the notes in question were given, and it authorized an agreement in writing to pay interest at a higher rate than 6 per cent.; but providing that, in no event, such rate of interest shall exceed the value of \$20 for the forbearance of \$100 for one year. The penalty provided is, that the usurious part of any such contract, and 25 per cent. interest thereon, shall be forfeited, to be recovered before any court of competent jurisdiction, and to be paid into the treasury of the county wherein the same may be prosecuted.

It is not pretended that the present proceeding is a pro-

execution to enforce a penalty for usury; but it is insisted, that the court below properly charged a usurious contract to be void in all its bearings. Such a decision would be correct in England, and in most of our own states, where the enactments on that subject declare such contracts usurious and void. But the validity of this contract must be tested by the usury act of our state, which was in force at the time it was made. It does not pronounce such contracts void, but merely forbids a greater rate of interest than 20 per cent., and provides that any excess, &c., shall be forfeited on proper prosecution. We regard it as the clear intention of the law to leave all such contracts in full force between the parties, except the usurious portion. The intention of the contracting parties should then be enforced so far as lawfully and clearly traceable to the full extent of its legal limitation. There can be no question but that there was an intention to pay at least 60 per cent. interest; and as the law authorized that rate of interest by agreement, we see no sound reason why the contract should not be enforced to that extent; and we are therefore of the opinion that the court below erred in deciding that the entire contract is void, merely because one portion of it is forbidden by law; although that portion is obviously divisible, and, under our statute, has no impairing effect upon the rest.

The legislative intention to preserve the validity of all such contracts, except the usurious portion of the interest, is fully evinced by the language of the act, by the forfeiture designated, and by the manner the prevailing legislation is avoided, which declares such contracts void.

It may well be assumed that contracts which are *malum prohibitum* should not have vitality imparted to them by courts of justice, and that such tribunals should not recognize a remedy which the law does not confer; but we cannot perceive that this familiar rule is in any respect departed from by our decision in this case. We follow what we believe to be the clear intention of the statute, in recognizing the contract as valid, so far as its legal

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features and the legal intention of the parties can be plainly traced. In doing this, we believe no violence is done to the doctrine held in *The Bank of the U. S. v. Owens*, 2 Peters, 527, and the cases therein cited.

In Ohio, under a statute more prohibitory than the one under which the notes in question were given, it has been decided that usury avoids the contract only to the extent of the illegal interest. *McLean v. Lafayette Bank*, 3 McLean, 587. In *Lafayette Ben. So. v. Lewis*, 7 Ohio, Part I., 80, it was held that when a contract is for more than 6 per cent., the principal may be recovered with 6 per cent. interest, which is the full extent authorized by statute.

2. It is also claimed as error, that the court overruled the objection of the plaintiff below, to the introduction of Silas Tolman, the payee and indorser of the notes, as a witness to prove the defence of usury.

As the question is not raised, we will not advert to the immateriality of the testimony to prove usury, which was fully established by the face of the notes sued, but briefly state our decision as to the competency of the witness.

The governing rule is, that a witness is competent, unless he is infamous or interested in the event of the suit. To this general rule policy has interposed a few exceptions, such as excluding the testimony of husband and wife for or against the other, and of admitting a man robbed, though interested, to testify against others for the robbery, and the like. These exceptions are admitted to preserve domestic harmony, and public security. But how can these motives, or even the appeal to commercial convenience, be applicable to the exclusion of a witness whose name appears upon negotiable paper?

Were we to follow the current of authority emanating from many of our older states, as cited by counsel for the plaintiff in error, we could not do otherwise than decide that the indorser is not a competent witness to invalidate a note. But more recent decisions, following

a more enlightened and progressive policy, have held the contrary doctrine.

The first adjudged cases in American courts appear to have been predicated upon *Walton v. Shelley*, 1 T. R., 296, made A.D. 1786. This seems to be the first reported case in England upon this question, and is founded upon a maxim of the civil law, that "*nemo allegariis suam turpitudinem est audiendus*," and from this sprang the supposed policy, that no party who has by his signature given credit to a negotiable instrument should be permitted to defeat it by his testimony. That inconvenience and even fraud may sometimes result from such a practice must be conceded; but it should be as readily conceded that even greater inconvenience and fraud may be practised on parties and strangers, by getting to fraudulent paper the names of all who might be witnesses to the transaction. No rule of evidence or form of law should extend such a shield to the guilty. Under this view of public policy, and the prevailing rule of competency, the case of *Walton v. Shelley* was overruled in *Jordaine v. Lashbrook*, 7 T. R., 601; and the payer, who was also indorser of the bill, was determined a competent witness to prove that the bill was drawn in London instead of Hamburgh, as it purported, and was therefore void for want of a stamp. And this has ever since prevailed as the recognized rule in England. *Rich v. Topping*, Peak N. P. R., 224; 1 Esp. N. P. C., 176; *Brand v. Ackerman*, 5 Esp., 119; *Kent v. London*, 1 Camp., 177; Peake Ev., 4th Ed., 255; 2 Stark. Ev., 298. And in 1 Phil. Ev., 5 Am. Ed., 43, the author, in commenting on the case of *Walton v. Shelley*, remarks, that it appears to have been the first decision in support of such a rule, and that the contrary is now fully established. The promptness with which the English courts have overruled their erroneous decision in that case is truly commendable; but we are constrained to observe, that exalted American courts have not pursued the same enlightened policy. Having once recognized as law the unsound doctrine of *Walton v. Shelley*, they appear to adhere to it

with remarkable pertinacity. This has especially characterized the decisions in Massachusetts on that question. As early as 1807, *Walton v. Shelley* was recognized in the case of *Warner v. Merry*, 3 Mass., 27, and it was then decided, that a party to a negotiable security shall not be permitted to testify that at the time he became a party it was void. And so the court continued to decide in *Parker v. Largey*, 3 Mass., 565; *Churchill v. Satter*, 4 *ib.*, 156; *Manning v. Wheatland*, 10 *ib.*, 502; *Butler v. Damen*, 15 *ib.*, 223; *Packard v. Richardson*, 17 *ib.*, 122. But in the case of *Knight v. Putnam*, 3 Pick., 184, the court questions the correctness of the decision in the case of *Manning v. Wheatland*. The opinion remarks, that "the authority of that case has been questioned, and the objection to the doctrine as there laid down is entitled to great consideration. The witness was held to be incompetent, not because he was interested, but on the ground of legal policy, which will not permit one who has transferred a negotiable security as valid to invalidate it by his testimony." And, indeed, the principle recognized in *Fox v. Whitney*, 16 Mass., 118, is by no means consistent with former decisions in that state. It was held that a promisor on the note as surety, the paper not having been negotiated, was a competent witness to prove that it was given for a usurious consideration.

Afterward, in *Van Shaack v. Stafford*, 12 Pick., 565, the maker of the note, being released, was held to be a competent person to prove usury in an action against the payee. And still, in the case of *Thayer v. Crossman*, 1 Metcalf, 416, the old doctrine of excluding a party to a note was again confirmed, but under greater limits and qualifications than had been previously recognized. Shaw, C. J., in an able opinion and general review of authorities, considers the rule settled for that commonwealth, by a course of decisions too direct and uniform to be drawn in question, but concedes the necessity of curtailing its extent and application. Though the rule of *Walton v. Shelley* has been repeatedly overruled by the court which adopted

it, and its error triumphantly exposed, still it is recognized in Massachusetts as in force, but limited in its application to a negotiable security indorsed and put in circulation in the usual course of business, and as not applying to notes overdue or otherwise dishonored. And this rule appears to obtain to an extent more or less limited in Pennsylvania. *Bond v. Cochran*, 4 S. & R., 397; *Griffith v. Riford*, 1 Rawle, 196; in Maine, *Dwering v. Lawlitt*, 4 Greenl., 191; *Chandler v. Morton*, 5 *ib.*, 374; and also by the federal supreme court, *Bk. of the Metropolis v. Jones*, 8 Pet., 12.

But in New York, though the rule was adopted in 1802, by a majority of the court in *Winton v. Saidler*, 3 John. Cas., 185, it was soon after overruled, and has never since been recognized in that state. *Stafford v. Rice*, 5 Cow., 23. It is in that case remarked, *per totam curiam*, that *Winton v. Saidler* is not law, not having been acted upon for many years, and having been repeatedly overruled; and that under the later decisions, a witness, whose name appears upon negotiable paper, may be received to prove usury in its inception. See also *Bank of Utica v. Hillard*, 5 Cow., 153; *Williams v. Walbridge*, 3 Wend., 415.

The rule of *Walton v. Shelley* has also been rejected—in Connecticut, *Townsend v. Bush*, 1 Conn., 260; also in Vermont, *Nichols v. Holgate*, 2 Aik., 140; in New Jersey, *Freeman v. Butlin*, 2 Harrison, 192; in Maryland, *Ringgold v. Tyson*, 3 Har. & Johns., 172; *Hunt v. Edward*, 4 *ib.*, 283; in Virginia, *Taylor v. Beck*, 3 Rand., 316; *Caldwell v. McCourtney*, 2 Grat., 187; in Kentucky, *Gorham v. Carroll*, 3 Litt., 221; in N. Carolina, *Guy v. Hall*, Murphy, 151; in S. Carolina, *Knight v. Paccard*, 3 McC., 71; in Georgia, *Slack v. Moss*, Dudley, 161; in Tenn., *Stump v. Napier*, 2 Yerg., 35; and also in Alabama, *Manning v. Manning*, 8 Ala., 138. In this case, Ormond, J., observes, that the doctrine first asserted in *Walton v. Shelley*, has been long exploded in England, and never was recognized by that court; but that the opposite opinion had been

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asserted in numerous cases. 1 Stew., 199; 9 Porter, 225, *ib.*, 406; 3 Ala., 93; 5 *ib.*, 385.

We must conclude, then, that in the case at bar, aside from the immaterial character of the evidence, the court below very properly admitted the witness Tolman to testify as to the original invalidity of the notes; but as the jury were improperly instructed as to the effect of usury upon the contract, the judgment must be reversed.

Judgment reversed.

J. H. Cowles, for plaintiff in error.

Wright and Knapp, for defendant.



SCOTT v. SWEET *et al.*

To establish a plea of want of consideration, parole evidence is admissible, to show that a promissory note was given for a patent right to make fanning mills, and that fanning mills made after the model of the right were worthless.

ERROR TO JEFFERSON DISTRICT COURT.

Opinion by WILLIAMS, C. J. This is an action of assumpsit, on a promissory note dated October 18, 1845, drawn by C. R. Hitchcock and Job C. Sweet in favor of William Scott, by which they, or either of them, promised to pay said Scott or order the sum of \$48, for value received, against the 1st day of March, 1846. Suit was brought before a justice of the peace. The plaintiff sued for the use of Theodore D. Porter. Judgment was obtained by the plaintiff. An appeal was taken to the district court, the cause tried there, and a verdict for the plaintiff and judgment thereon for \$53.96, with costs. The defendants put in their pleas, that the consideration for which the note had been given had

wholly failed; that the note was without consideration when made and delivered to Scott; and also payment in full. Issue was joined between the parties. The question for adjudication here is presented by the bill of exceptions. To maintain the issue on their part, the defendants offered to prove by parole testimony, that the note was given in consideration of a patent right to make fanning mills, which they purchased from plaintiff, and that the right proved to be worthless because the mills would not work beneficially. To the introduction of this evidence the counsel for the plaintiff objected, on the ground that the conveyance of the right could only be in writing, which must be produced, or its absence accounted for, and that it could not be proved by parole testimony. The court sustained the objection and refused to let the evidence offered go to the jury. The defendants then offered a witness to prove a want of consideration for the note on which this suit was brought, whose evidence would go to establish the following facts to maintain their part of the issue, viz.: "That the said note was given for a supposed right to make fanning mills, and that the said Scott warranted the fanning mills, made after the manner of the right which he sold, to do good business, and also that the said fanning mills did not do good business and were of no account." All of which parole testimony the court refused to admit, on the ground that the written transfer of the patent right must be produced, or its absence accounted for, by the defendants. The defendants excepted to these rulings of the court, all of which appear in due form of record in the case.

The only question for adjudication in this court, is as to the decision of the district court in refusing to admit the parole evidence offered by the defendants as above stated. Upon the issue between the parties, we think it was both proper and material that the evidence as offered should have been suffered to go to the jury. In this proceeding, notwithstanding there might have been a transfer in writing of the patent right, it does not necessarily

follow that, in an action on the note, parole evidence of matters arising collaterally out of that transaction may not be material in the adjustment of the rights of the parties, and properly admissible in the case. Although a written document, which by authority of law or private compact is constituted the authentic and proper instrument of evidence by a general and inflexible rule, yet there are cases where the mere existence of written evidence never excludes independent parole evidence to prove the same fact. 1 Starkie on Ev., p. 303.

It is given as a principle, to be observed in relation to the exclusion of parole evidence of a contract, that in order to exclude it, proof must be made that the contract was in writing. 1 Starkie on Ev., 505. In 4 Esp., C. 13, referred to in Starkie above cited, in a note, it was held that "where A gave a warrant of attorney to secure a joint debt to B and C, and B received the whole, in an action by C to recover his moiety, A may be called to prove the payment without the production of the warrant of attorney." On the same page of Starkie, 1st vol., the case of *Wood v. Morris*, 12 East., p. 237, where it was decided that, "after the plaintiff in ejectment had given parole testimony in evidence of the tenancy, the evidence was held to be sufficient, although it appeared by the cross examination of his witness that an agreement relative to the land in question had been produced upon a former trial between the same parties, and had been seen in the hands of the plaintiff's attorney on the same morning." But the defendants, in the case at bar, offered to prove that the mill, for the right to which they gave the note upon which this suit was brought, was warranted by the plaintiff to do good work, and that the same was worthless for business, and the court rejected the evidence. If the contract was shown to be in writing, we think it was competent for the defendants to show by parole evidence that the plaintiff, independently of the written transfer, had warranted the mill to work well, and then to follow that showing by proof that it was worthless. We are of

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the opinion that, as the case is presented, the district court erred in rejecting the parole evidence offered by the defendants upon the trial below.

Judgment reversed.

Charles Negus, for plaintiff in error.

Slagle and Achison, for defendant.

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An attorney to whom a claim was intrusted for collection, and who employed another attorney to commence suit upon it, is not an incompetent witness. An attorney may be a witness for his client.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by KINNEY, J. This was an action of assumpsit, commenced by attachment, upon an account of about \$500. The precipe for the writ was filed by Hall and Cowgill, attorneys for plaintiff. The pleadings in the case were all conducted by A. Hall, Esq.

The evidence, as contained in the bill of exceptions, shows that the plaintiff introduced as a witness James Cowgill, whose name appeared on the precipe as attorney. He stated that he was an attorney at law of the state of Missouri; that about the 1st of September, 1847, the account was placed in his hands for collection; that he had visited the defendant, and subsequently placed the claim in the hands of Mr Hall; that he expected to be paid for his services in looking up the claim, &c. Upon the request of counsel for defendant, the court ruled out the testimony of Cowgill, upon the ground that he was incompetent, as there was a *prima facie* liability to the plaintiffs for neglect. Whereupon the plaintiffs submitted to a nonsuit. Two questions are raised in the argument of the case.

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1. Was the witness interested in such a manner as would render him incompetent to testify?

2. Can an attorney, in any case, be a witness for his client?

Upon the first point, from a careful examination of the matters sworn to by the witness, we cannot think that his interest was of such a character as should have excluded his testimony from the jury. The rigid rule, as formerly obtained in regard to the incompetency of witnesses, appears to be relaxing to some extent, and yielding to the more reasonable one of permitting witnesses who were once regarded as incompetent to testify, leaving their credibility with the jury. Indeed, some of the law writers of the day are discussing with seriousness the propriety of dissolving all distinction between competency and incompetency, and referring the testimony of witnesses, with all the interest and objections that surround it, to the consideration of the jury, for them to place such reliance upon as it deserves. While there may be apparently many good reasons in support of this position, it cannot be expected that the courts, expounding the law as it is, will be influenced by a doctrine so diametrically opposed to the well-established land marks of the law.

But in this case, we are asked by the counsel for the defendant in error to lay down a rule which will prevent attorneys from testifying in behalf of their clients, and in support of this, we are referred to a recent decision made in Pennsylvania, in which Judge Lewis delivers an opinion which is marked for its elegance, if not for its soundness. However high in the estimation of that learned judge the members of the profession may stand, we think he pays them but a poor compliment by intimating that their professional zeal for the success of their clients would compel them to swerve from a rigid observance of truth and veracity. But it is said that they should be excluded for their own protection. A character above reproach, an integrity of purpose that cannot be questioned, which we are happy to say has distinguished the profession in all

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ages, is the only protection that any person requires to prevent suspicion or unjust imputation. While it sometimes becomes a matter of necessity for an attorney to testify in a case in which he is concerned, to prove the execution of papers, or, as in this case, the correctness of an account, an attorney would certainly be negligent of his duty, were he to remain silent, and permit his client's interest to suffer, allow a just claim to be defeated, and the ends of justice subverted by reason of his professional position. While we say this, we are also free in saying that no respectable member of the profession, who properly appreciates his position in society, and at the bar, will so far forget the dignity of his profession, and his relation to the court, as to become the willing and pliant tool in the hands of his client in the capacity of witness. In this case the court erred by excluding the testimony of Cowgill upon the ground of his interest, and although the question of the competency of attorneys to testify in behalf of their clients is not properly raised in the bill of exceptions, yet as the practice is not uniform in the state upon that subject, and as we have been requested by counsel to pass upon the question, we have thought proper to do so. The judgment of the court below is reversed, and a trial *de novo* awarded.

Judgment reversed.

A. and J. C. Hall, for plaintiffs in error.

Wright and Knapp, for defendant.

Bonney v. Van Buren Co.

BONNEY v. VAN BUREN CO.

Counties are liable for costs in criminal cases in which *nolle prosequi* are entered, or in which indictments are quashed, or demurrers to them are sustained.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by GREENE, J. J. H. Bonney submitted his account to "the board of commissioners of the county of Van Buren," for services rendered as sheriff and clerk of the district court of that county in criminal cases, in which *nolle prosequi* were entered, and in which indictments were quashed or demurrers to them were sustained. The items in the account were admitted to be correct, but the board of commissioners decided that the county was not legally liable for the services, and therefore refused to audit and allow the claim. Upon an agreed case in the district court this decision was affirmed.

It is contended that the court erred in thus deciding that the county is not liable for costs of the prosecution in cases disposed of by *nolle prosequi*, by motion to quash, or by demurrer to indictments. The various enactments against adjudging costs against counties in criminal proceedings apply exclusively to cases of *acquittal*. Rev. Stat., p. 214, provides, that "the county commissioners may allow the sheriff and clerk of the district court any sum not exceeding \$30 per annum, for services in criminal cases where the party is acquitted." In the *United States v. Switzer*, Morris, 302, it was decided that the entering of a *nolle prosequi* is not an acquittal, and that a judgment in such case may be rendered against the county for costs. As none of the services in the case at bar appear to have been rendered in acquittal cases, we consider the county liable for them. We cannot feel justified in extending to the statute a construction broader than its letter imports; nor can we believe it to have been the intention of the legislature to deprive county

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officers of just and adequate compensation for services required of them by law, when no such intention is explicitly set forth in the statute.

Judgment reversed.

A. Hall, for plaintiff in error.

H. M. Shelby, for defendant.

BRADLEY v. KENNEDY.

Where the declaration in slander contains several counts, two of which charge the speaking of words at different times, and a general verdict is rendered, the judgment will not be reversed.

It is the exclusive province of a jury to decide the facts in a case.

It is not error to exclude immaterial testimony.

To sustain the plea of justification to an action of slander, the testimony of more than one witness, or of one witness, and strong corroborating circumstances, are necessary.

ERROR TO WAPELLO DISTRICT COURT.

Opinion by WILLIAMS, C. J. James Kennedy brought his action for slanderous words against Thomas W. Bradley, in the district court of Wapello county. The declaration of the plaintiff sets forth, in the proper form of law, words alleged therein to have been spoken by the defendant of and concerning the plaintiff, imputing to him, and charging him with, the crime of perjury. There are several counts contained in the declaration. The words laid in each are substantially the same, and they are clearly actionable. The defendant filed his plea of not guilty and justification. The cause was tried by a jury, and a verdict and judgment rendered in favor of the plaintiff for \$100 damages.

The first error assigned is, that "the district court erred in overruling the motion to arrest the judgment, on

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the verdict of the jury." In support of this motion, it was alleged, in the court below, that the declaration contains several counts, two of which charge the speaking of different words at different times, whereas the verdict of the jury is general.

It is true that the declaration is made up of several counts, and that the words, in two of the counts, are not precisely the same, and are laid to have been spoken at different times. But, substantially, the words laid in them charge the same crime upon the plaintiff below, being that of wilful and corrupt perjury, in such a manner as to render them in law actionable. The fact that they are laid as having been spoken at different times furnishes no ground for an available objection. The words charge the same crime, and the finding of the jury was, doubtless, based upon the conclusion that the evidence adduced satisfactorily proved the allegations contained in all the counts. The counts do not show a charge of more than one crime. Besides, the pleas of the defendant, being the general issue and justification specially pleaded, apply to all the counts in the declaration alike. We find no legal objection to the verdict on this score. The court, therefore, did not err in overruling the motion to arrest the judgment.

The second error assigned is, that the "district court erred in this, that the judge instructed the jury as to the facts of the case, and not as to the law alone."

This assignment has not been pressed upon the attention of this court with much apparent confidence by the counsel for the plaintiff in error; but, nevertheless, being presented for adjudication, it devolves upon us to examine whether it be well founded.

Our legislature, by positive and prohibitory enactment, have confined the judges of our district courts to instruction in the law alone, and made it the exclusive province of the jury, unaided and unadvised by the court, to decide as to the facts in question, adduced in evidence on the trial. After careful and full examination of the bill of

exceptions in this case, we think that the judge who tried the cause below has not overstepped the limits prescribed by the legislature in the instructions given.

The third assignment of error is, that "the judge of the district court erred in excluding the testimony of witnesses in respect to the declarations of the plaintiff below, that he was prosecuting the suit to break up defendant, who felt too large, and he was determined to bring him down, and that his father-in-law had furnished him (the plaintiff) with \$500 to carry on the suit." The question here presented is this, viz.:—Was this evidence material in this case, upon the issue joined between the parties? We are unable to see its materiality. The defendant, after pleading the general issue, pleaded specially justification. He first put the plaintiff to the proof of the words, as alleged in the declaration to have been spoken; and then, in the event of their being proved, for a defence to the plaintiff's action, by his special plea, stood forth before the court and jury, and justified the speaking of the words, by affirming and contending that they were true. We cannot see what material bearing the evidence offered could have on the case so presented; as the case stood upon the issue thus joined, and at this point in the proceeding, the defendant was exclusively put upon the proof of his plea of justification. Had he merely put in the plea of the general issue, denying only the speaking of the words, then the motive of the plaintiff in bringing the suit might with more propriety have been assailed. But the evidence offered, fairly construed, could establish no more than that the plaintiff was not without the means of prosecuting his suit, which had been already instituted; and that the defendant had assumed high ground in charging the crime of perjury upon him, and that the effect of the proceeding at law, then pending between them, would be to break him up. We think that the judge of the district court did not err in rejecting the testimony so offered as irrelevant.

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The fourth and last error assigned is, that there was error in the instructions of the judge, "that the testimony of more than one witness was necessary to sustain the defendant's plea of justification."

The judge instructed the jury that the defendant was bound to make out his plea of justification affirmatively in such a manner as to sustain the charge of perjury, which he, by his plea, made against the plaintiff. To do this legally, his instruction to the jury required him to prove by more than one witness, or by one witness and corroborating circumstances, which would, to the satisfaction of the jury, give the preponderance of truth to the evidence of that witness, against the evidence which had been given upon oath by the plaintiff on the trial or trials, wherein he had accused him of swearing falsely, as alleged in the declaration of plaintiff; that thus the equilibrium produced by the oath of one man against that of another, in relation to the same subject matter, would be destroyed by the weight of reasonable and truthful circumstances, and the question at issue be legally decided. This is the substance of the instruction given by the judge on this point. But a brief examination of this question is necessary to show that the instruction given by the judge to the jury on this point was in accordance with sound law. The grave and heinous crime of perjury is charged by the defendant against the plaintiff. On a prosecution for that crime, by the laws of our country the testimony of more than one witness, or one witness and strong corroborating circumstantial evidence, are required to substantiate the charge and procure a conviction. The accusation made by the defendant against the plaintiff, as laid in the declaration, and which he insists by his plea is true, is wilful and corrupt perjury in a criminal and legal sense—which, if true, and established legally, would subject the plaintiff to the severe penalty of a crime, and render him infamous. The charge made by defendant was perjury in its legal sense. By the soundest dictates of reason and law then, as the charge made by him against the plaintiff involved crimi-

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nal guilt under the law of our land, upon the issues joined in this case, he was justly and legally required by the court below to make good his accusation by such evidence as is required legally to establish a conviction of the offence charged. To establish and inculcate any other doctrine than this, would release the defendant from the responsibility he assumed by speaking the words as laid in the declaration, and leave the plaintiff without redress commensurate to the wrong and injury sustained by him. Whilst the accusation made against him would be perjury in its full, legal, and infamous sense, the defendant would excuse himself by evidence which could not establish the commission of any such crime. In a case like this, where the defendant undertakes to justify, it is just, as well as legal, that he should be required to make good his plea affirmatively, fully and legally.

We find no error in the proceedings of the court below.

Judgment affirmed.

J. H. Cowles, for plaintiff in error.

Wright and Knapp, for defendant.

PIERSON v. BAIRD.

By an act approved January 15, 1849, all instructions from district judges to petit juries are to be given in writing.

That law took effect, by publication in newspapers, on 31st January, 1849.

Courts should know *ex officio* at what time laws take effect.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by KINNEY, J. The only question raised in this case by the bill of exception is, Did the court err by giving oral instructions to the jury? The cause was submitted to the jury upon the oral instructions of the court,

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on the 21st day of February, 1849. It appears from the bill of exceptions that the court at the time was not aware that a law had been recently passed requiring instructions to petit juries to be in writing, and prohibiting oral instructions, and proceeded to give the instructions in the usual manner, to which the counsel for the plaintiff in error excepted. The 27th section of the 4th Art. of the constitution of Iowa provides, "that no law of the general assembly of a public nature shall take effect until the same shall be published and circulated in the several counties by authority. If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state."

Upon the 15th day of January, 1849, the legislature passed a law requiring the judges of the district courts to instruct the petit juries in writing. The act provides, that it shall take effect from and after its publication in the *Capital Reporter* and *Iowa Republican*. From a note appended to the act, it appears that it was published in one of these papers on the 24th of January, and in the other on the 31st.

This law was of a public nature. The general assembly, deeming it of immediate importance, had the right under the constitution to order it to be published in newspapers in the state, and when so published the constitution provides that it shall take effect. Courts are bound *ex officio* to take judicial notice of the publication, in this way, of all laws of a public nature. The time fixed by the constitution for them to take effect is by publication, and when so published, they become the laws of the land. This unrestricted provision of the constitution, if resorted to by the general assembly, may and often will produce injustice and oppression, which it is not within the power of the courts to remedy or prevent; and hence such laws as would be injurious in their tendency, by reason of their not being circulated and known, ought not to take effect in this constitutional manner. Nevertheless the general

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assembly have the right to give their acts vitality and force by newspaper publications, however much to be deprecated, or oppressive in their consequences. As the constitution has fixed the time for these laws to take effect, it is not within the power of the courts to prescribe the time which, in their opinion, would be sufficient for these newspapers to be circulated, and through them the laws generally known.

In the case before us, the act had been published about one month, and although the court was not aware of its passage, it erred, and the case must be reversed.

Judgment reversed.

A. Hall, for plaintiff in error.

Wright and Knapp, for defendant.



ROGERS v. ALEXANDER.

Where two motions are pending at the same time—one by defendant, to affirm for the want of notice, and the other by plaintiff, for leave to withdraw the writ of error—the supreme court will, at discretion, give preference to that motion which the nature and justice of the case may require.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by GREENE, J. This case comes before us on two motions—one to affirm the judgment for want of notice of suing out the writ of error, and the other by plaintiff in error, for leave to withdraw the writ and papers without prejudice.

The question arises, To which of these motions shall we give precedence? This is a matter not regulated by rule or practice, and is consequently confined to the discretion of the court, to be determined by the circumstances of each particular case.

Jefferson Co. v. Savory.

That clause of the statute requiring fifteen days' notice, and in default thereof, an affirmance of the judgment unless good cause be shown for the failure, is an imperative rule upon the court, which cannot always conform to the rights of parties. The stringent, inflexible character of the rule must necessarily work a hardship in some instances, unless counteracted in justifiable cases by an interposing motion, such as an application to withdraw the writ without prejudice. This application, however, can only receive priority over a motion to affirm for want of notice, in peculiar cases in which the rights of a party might be injuriously affected by its refusal. And in this light we recognize the present case. The appealing party appears to have acted in good faith, without motive to retard the operations of justice, and at least with grounds of defence upon which a question may properly be raised. We therefore feel it our duty to grant the motion to withdraw the writ and papers in this case, without prejudice.

Motion granted.

A. Hall, for plaintiff in error.

H. M. Shelby, for defendant.



JEFFERSON CO. v. SAVORY.

When a note is so written that it is impossible to tell whether it is dated Jan. or Jun., parole evidence may be admitted to determine the true date; and the fact should be referred to the jury for determination.

ERROR TO JEFFERSON DISTRICT COURT.

Opinion by WILLIAMS, C. J. The plaintiff's action is brought on a promissory note calling for \$68.95, drawn by the defendants here, and Samuel Shuffleton, who died before the commencement of this suit. The declaration

of the plaintiff contains a special count on the note, and therein alleges that the defendants, with the said Shuffleton, "on the ninth day of June, 1841, &c., made their promissory note in writing," &c. To this special count the common counts in assumpsit are added, in the first of which an exact copy of the note is given. Issue having been joined by the parties, at the March term of the district court the cause was tried, and judgment of nonsuit entered against the plaintiff.

The plaintiff in the court below complains here, that the judge of that court improperly refused to allow him to read in evidence, on the trial before the jury, a note signed by the defendants and said Shuffleton, to sustain his action. This is the only error assigned.

The question adjudicated by the court below, and presented here by the bill of exceptions, arises from an allegation of variance between the instrument of writing set forth in the plaintiff's declaration and the note offered in evidence to the jury to maintain the plaintiff's action.

The facts contained in the bill of exceptions are in substance as follows: "The note offered as evidence to the jury on part of the plaintiff was objected to by the defendants, on the ground of variance. The date of the note declared on was June 9, 1841, and the note offered as evidence was identical with that described in the declaration in all material points, except the name of the month, and the judge, in the language of the bill of exceptions, certifies that the "date of the note produced was so written that it would read equally well either "*Jan.*" or "*Jun.*," and from the face of the note the court could not say which it was." The court then permitted the plaintiff to show by parole evidence when the note was in fact made, and the plaintiff gave evidence that it was made in *January*. The plaintiff further proposed to prove that the word was *June*, and that it was written by Shuffleton in his usual manner of writing the word June, but the court refused to hear the evidence.

The plaintiff then insisted that the note should be

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allowed to go to the jury for adjudication as to the question of the date, which was refused by the court, until evidence should be adduced to the court, proving that it was a June note. The note was rejected by the court, and the plaintiff nonsuited.

The bill of exceptions presents rather a peculiar state of facts. It is distinctly stated, that by inspection of the note offered in evidence, it was not in the power of the court to decide what the name of the month, as written, was; whether it should read June or January. For the ascertainment of this matter resort was had to parole evidence by the permission of the court. Having done so, and having heard some testimony on the subject with a view to establish in a satisfactory manner to the mind of the court the true date of the note, we are at a loss to understand why the plaintiff was not suffered to proceed, as offered by him, to give evidence of the date as written in the note. The same rule which would warrant the hearing of a part of his evidence would admit it all; and as the proposition was to prove that the word written in the note was "*June*," we think the establishment of that fact in the mind of the court would have been quite likely to dispel the doubt existing there, and might have settled the question.

But we are of the opinion that the court erred in refusing to let the note go to the jury for the purpose of ascertaining the date. By the bill of exceptions, it appears clearly that, from the face of the note offered in evidence, the court was unable to decide whether the word written for the name of the month should be taken for June or January, but might be taken for either with equal propriety. In such a case, the party objecting to the evidence, and asking the interposition of the rule of law which requires the proof offered to correspond with the allegations in the declaration, and who claimed the benefit of the objection, should have made out the existence of that variance to the satisfaction of the court, from an examination of the instrument itself. Unless the variance

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was manifest and satisfactorily apparent to the mind of the court, the note should have been suffered to go to the jury, there to pass through that ordeal instituted in our country for the adjustment of controverted facts upon the issues made up by the parties.

This we think is the safer and better rule in cases like this. Where the court cannot decide, the instrument should be allowed to go in evidence to the jury, submitting this question of fact, with all such other facts as may arise in the cause, to their verdict, under the instruction of the court as to the law.

Judgment reversed.

C. Negus, for plaintiff in error.

E. Down, for defendants.



MARSHALL *et al.* v. MARSHALL

In proceedings in chancery against non-residents, a brief statement of the object and prayer of the petition must be published for six weeks successively, in some newspaper printed in the county where the petition or bill is filed, &c.

The publication is, in contemplation of law, a service of process upon the defendants, and unless made as required by statute, no service is obtained, and the proceedings of the court are *coram non judice*, and void.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by KINNEY, J. This was a proceeding under the statute, by the defendant in error, for partition against the plaintiff and others, and minor heirs, who were non-residents.

Publication was ordered by the court as against the non-residents. A guardian *ad litem* was appointed for the infant heirs, and the case having been heard, and it

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appearing to the court that publication had been made according to law, it was ordered that partition be made of the premises, which was done by the commissioners appointed for that purpose, and their proceedings duly confirmed.

The case is brought to this court upon writ of error, and a reversal of the order of partition is asked upon the ground that the publication was not according to law.

By the first section of an act relating to petitions and proceedings in chancery, Iowa Laws, 1844, p. 49, it is provided, that in proceedings against non-residents, a brief statement of the object and prayer of the petition shall be published for six weeks successively, in some newspaper printed in the county where the petition or bill is filed, &c. By an inspection of the record in this case, the publication as sworn to by the publisher only appears to have been continued for four weeks, and this is the error complained of by the plaintiff. This error is a fatal one, and the decree of the court must be reversed. If **two weeks** of the publication less than required by law could be dispensed with, the entire publication could, upon the same principle, be avoided; and therefore the non-resident defendants be proceeded against, their interests affected, and their rights concluded, without ever having had a day in court.

This publication is in contemplation of law a service of process upon the defendants, and unless made as required by the statute, no service is obtained, and the proceedings of the court under it as regards them are *coram non judice*, and void.

But it is urged here by counsel, that the plaintiff in error was served with personal service, and cannot complain of the irregularity of the proceedings; that they are only void as against the non-resident defendants, if void at all. This position is incorrect and unsound. It appears from the report of the commissioners of partition that a portion of the land was allotted to James Marshall, the plaintiff in error, and as this is the foundation of his title, it

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becomes a matter of vital importance to him that the proceedings in partition, from which he derives his title, should have been according to law. The plaintiff is not excluded from raising the objection presented in the assignment of errors.

Judgment reversed.

J. H. Cowles, for plaintiffs in error.

Wright and Knapp, for defendant.



GORDON v. MOUNTS.

The statute of limitations approved February 15, 1843, cannot be pleaded in bar to an action of debt within six years after the act took effect.

ERROR TO POLK DISTRICT COURT.

Opinion by GREENE, J. This was an action of debt on a writing obligatory under seal. In the court below the defendant pleaded the statute of limitations, to which the plaintiff demurred, and the court overruled the demurrer.

This ruling of the court is assigned as error, and is the only question raised in the case. Under former decisions of this court, which we see no sufficient reason now to disturb, the statute of limitations cannot be pleaded in bar to such an action, commenced within six years after the act took effect. The act does not operate retrospectively, nor run conjointly with the repealed act of 1839.

This suit was commenced on the 17th day of January, 1849, and the act for the limitation of actions did not take effect till the 4th day of July, 1843; consequently it could not be pleaded in an action of debt previous to the 4th of July, 1849.

Hinch v. Weatherford.

The court below having erred in overruling the demurrer, the judgment is reversed and a trial *de novo* awarded.

Judgment reversed.

W. H. SeEVERS, for plaintiff in error.

J. C. Hall, for defendant.



HINCH *et al.* v. WEATHERFORD.

Statute of limitations approved February 15, 1843, cannot be pleaded in bar to any action of debt, assumpsit, &c., commenced before July 4, 1849.

ERROR TO MAHASKA DISTRICT COURT.

Opinion by GREENE, J. This suit was commenced before a justice of the peace on the 28th of December, 1848, on a promissory note dated January 5, 1841, payable one day after date. The defendant pleaded the statute of limitations, and obtained judgment; and thereupon the plaintiff took an appeal to the district court.

On the trial, the court charged the jury, that by the terms of the note, the cause of action accrued more than six years before the commencement of the suit; and that, as it came within the statute of limitations, the plaintiffs could not recover. This instruction under former decisions of this court was erroneous.

It has repeatedly been decided by this court, that the Iowa statute of limitations, approved February 15, 1843, cannot be successfully pleaded as a bar to any action of debt, assumpsit, &c., commenced within six years after the act took effect. As the act was not in force, and did not commence running as a limitation of suits till the 4th day of July, 1843, such an action could only be brought

Kimble v. Riggin.

within its purview after the 4th day of July, 1849. But in this case, the suit was commenced on the 28th of December, 1848, and consequently the limitation was improperly applied.

Judgment reversed.

***W. H. SeEVERS*, for plaintiffs in error.**

***J. C. Hall*, for defendant.**



KIMBLE v. RIGGIN.

Where, on an appeal to the district court from the judgment of a justice of the peace, it appeared that no judgment was entered by the justice on the verdict of the jury, *held* that the district court had no jurisdiction of the cause; and that even the appearance of the parties in the supposed appeal in the district court could not confer jurisdiction over the invalid proceedings of the justice.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by GREENE, J. This case was commenced before a justice of the peace, and a verdict found for the plaintiff. Upon this verdict no judgment was rendered by the justice. The case was taken to the district court by appeal, and the plaintiff there obtained judgment.

It is urged as an objection, that as there was no judgment rendered by the justice, there was nothing to appeal from—nothing over which the district court could exercise jurisdiction. The statute provides for an appeal from the judgment or decision of a justice. Without such judgment or decision, it is manifest that there is no ground for appeal, nothing to appeal from, and that the appellate court could exercise no jurisdiction. The case not having been taken to the district court from the decision of a justice, nor in any manner provided by law, that court could

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not properly entertain the proceedings, nor enter judgment thereon. In such a case, even the appearance of the parties in the supposed appeal could not confer jurisdiction over the invalid proceedings of the justice. The case would have been different had the parties appeared originally in the district court, and by consent proceeded to trial; but as the appearance, trial, and judgment were predicated upon an appeal unauthorized by law, we can but regard the proceedings as a nullity. But it is urged, that as the statute authorizes a trial *de novo* on an appeal, the difficulty as to jurisdiction, occasioned by a want of judgment in the inferior court, is removed. We are unable to see how this fact can confer jurisdiction. Though a trial *de novo* is awarded in the district court, that trial is of an appellate character. The powers of that court over the parties, and the subject matter, emanate exclusively from the appeal. The very rules of pleading, of evidence, and of practice, the same limitation of jurisdiction, follow the appeal from the inferior to the higher tribunal, and must regulate and govern the trial *de novo*.

There having been no foundation for the appeal, and hence a want of jurisdiction in the district court, the judgment in this case must be reversed.

Judgment reversed.

Wright and *Knapp*, for plaintiff in error.

A. Hall, for defendant.



ELLIS v. MOSIER.

A contract by which E agrees to purchase for M, at the United States land office, a portion of public land, upon which M has made valuable improvements, is not repugnant to the act of Congress passed in 1830, to pre-

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vent fraudulent practices at the public sales of the lands of the United States.

Where an agreement is not calculated to prejudice the price and sale of the public lands, it is not affected by the law of 1830.

Agreements in relation to improvements and claims on the public lands are recognized by the laws, courts and customs of Iowa.

IN EQUITY. APPEAL FROM MAHASKA DISTRICT COURT.

Opinion by GREENE, J. Enoch Mosier filed his bill in chancery for the specific performance of a contract made for improvements on public land. It appears that Mosier had a claim and valuable improvements on half a section of land belonging to the United States, and made a bargain with Julian Ellis, by which he sold him one half thereof, and as the land on division could not be purchased in the name of each of the parties at the public sales, it was agreed that Ellis should purchase the land and take the certificate of purchase in his own name, and thereupon deed to the complainant his half of the land. It also appears, that the complainant furnished his share of the means for the purchase in the claim, which was valued by the parties at \$400; that the defendant offered to pay to the complainant the purchase money for the half of the claim he had purchased, but the complainant intrusted the keeping of it to the defendant, under his promise to act as his agent in applying it to the purchase of the land in question. A written agreement under seal was accordingly entered into between the parties, on the 22d of June, 1846, which witnesseth: "That Enoch Mosier hereby agrees to permit Julian Ellis to enter at the coming land sales his entire claim, situated in Mahaska county, Iowa territory, consisting of one hundred and sixty acres of prairie, and one quarter of timber, on the following conditions, which Julian Ellis binds himself by these presents, in the penalty of \$1000 to perform: Julian Ellis to furnish \$400 to enter the claim all in his own name, and then so soon as he can obtain a certificate from the land office, to deed to said Mosier the north half

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of the quarter section of prairie, and eighty acres of the timber, consisting of that part of the quarter section which the said Mosier shall select," &c. A particular description of the land is set forth in the bill, and also an averment that the complainant selected the west half of the quarter section of timber referred to in the agreement, and gave written notice of such selection to the defendant. The defendant, it appears, entered the land accordingly, obtained for it a certificate, and subsequently a patent from the President of the United States; and that both parties entered upon their respective portions of the land, and each continued in possession by the consent and acquiescence of the other; that the complainant has greatly enhanced the value of his portion of the land by valuable improvements; and that he has often applied to the defendant for a performance specifically of his agreement, by conveying the land in question, but that he had wholly neglected and refused so to do.

The defendant demurred to the bill, which was overruled; having failed to plead or answer as required by rule of court, he was considered in default. By the decree, it was adjudged that the respondent make and deliver to the complainant a good and sufficient warranty deed of the real estate set forth in the bill, within thirty days from the adjournment of that court, and that in default thereof, the real estate in question should be vested in the complainant by virtue of the decree, which should be treated as a conveyance.

It is now urged, that the court should have sustained the demurrer to the bill on the ground that the agreement between the complainant and respondent was founded upon an unlawful consideration, and was therefore void. To show the illegal character of the contract, the respondent refers to the 4th and 5th sections of an act of Congress, "for the relief of the purchasers of the public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States," approved March 31, 1830. The 4th section referred to provides a

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penalty against any person who "shall, before or at the time of the public sale of any of the lands of the United States, bargain, contract or agree with any other person, that the last named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or shall, by intimidation, combination or unfair management, hinder or prevent, or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale." The 5th section provides, that all agreements before or at the public sale, "to purchase such land, to pay or give to such purchasers for such land a sum of money, or other article of property, over and above the price at which the land may or shall be bid off by such purchasers," shall be null and void.

The question arises. Does the contract between the parties in this case come within the object and meaning of the law above referred to? The prevailing object of the law clearly is to prevent agreement and combinations prejudicial to the price and sale of the public lands; and to promote that object, the 4th section renders it a penal offence to make any bargain or combination to prevent bidding upon government lands offered at public sales; and the 5th section declares all contracts and agreements void which tend to preclude such bids. Is there any thing in the arrangement and contract between these parties which can implicate them as violating these regulations of Congress, or render the contract they entered into void? We think not. It was a legitimate transaction, recognized by the prevailing customs of the West, sanctioned by the laws of our state and by the decisions of our courts.

Mosier had a claim and valuable improvements on the public lands, and for one half of the claim Ellis engaged to pay him \$200. Mosier intrusted the \$200 with Ellis, as agent, to purchase for him his remaining portion of the land at the public sales, with the understanding that Ellis should deed to Mosier his portion of the purchase, upon its being perfected. Here was no agreement,

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as contemplated by the 5th section referred to, by which the purchaser of the land at the sales was to receive "a sum of money or other article of property over and above the price" bid by the purchaser. We can only recognize it as a contract by which Ellis agreed to pay Mosier for improvements, and as a consideration therefor, give him \$200, which he was to pay by purchasing for him at the public sales the quarter section of land in controversy. So far from discouraging or prejudicing the sale of the public domain, it was throughout a transaction by which the value was enhanced and the sale secured. The improvements not only gave value to and promoted the sale of the land for the government, but also enhanced the value and would necessarily promote the sale of the adjacent lands. It cannot then be successfully urged, that the improvements upon, or the contract in relation to, the land described in complainant's bill, either abated the price or retarded the sale of government lands; nor can we see why the contract should be regarded as a nullity under the sections of the act we have cited. We regard it as an agreement entirely removed from the objectionable conditions which are condemned by that law.

The principle that improvements and a claim on public lands constitute a valid consideration, in bargains relating to and founded upon them, has been repeatedly recognized by our territorial supreme court. *Morris' Iowa R.*, *Hill v. Smith et al.*, 70; *Freeman v. Holliday*, 80; *Stannard v. McCarly*, 120; *Starr v. Wilson*, 438.

We are unable to see any feature of equity or good conscience in the objections raised by the respondent to the decree of the district court. Indeed, all the circumstances of the case, the fiduciary capacity which respondent assumed, and in which he acted, the manner in which he recognized the occupancy, possession and improvements of the complainant subsequent to the purchase of the real estate, present a forcible appeal in contemplation of equity

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jurisprudence in support of the justice and correctness of the decree.

Decree affirmed.

J. C. Hall and *W. H. SeEVERS*, for appellant.

Wright and *Knapp*, for appellee.



GAMES v. MANNING.

Where a promissory note for a sum certain is payable in leather at the tan-yard of the maker, a demand of the leather is not necessary.

In a suit against the maker of a note, or the acceptor of a bill payable at a specified time and place, it is not necessary to aver or prove a demand of payment, and the same rule is applicable to notes payable in specific property.

In order to discharge himself from a note payable in specific articles, it is necessary for the maker to show that he had paid, tendered, or set apart the property as payment of the note.

If a debtor make a tender of the specific articles he has promised, and properly designated and set them apart at the time and place stipulated, and the creditor is not there to receive, or refuses to accept the property, the debt is thereby discharged, and the property passes to the creditor.

A demand, after a property note becomes due, is a waiver of any previous breach, and gives the maker a second opportunity to pay in property.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by GREENE, J. Assumpsit on a promissory note made by G. W. Games for \$300 payable in leather, on or before January 1, 1844, at his tan-yard. A memorandum on the back of the note stated the price of sole and harness leather at 28 cents per pound, and upper leather at 50 cents per pound, and the agreement of Games to pay the note in leather at those prices, one third of each kind, one half by the 1st of September, and one half by the 20th of September, 1844, and that Manning agreed to take the leather as above specified. On

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the trial, it appeared in evidence that James Weir, to whose order the note was made payable, had assigned it to Manning after it became due, and no evidence was given of a previous demand, or tender, or readiness to pay; that the arrangement stipulated in the memorandum on the note was entered into by the parties to this suit, after the assignment, and that, after the last instalment mentioned therein fell due, Manning called for the leather at the tannery, and though the defendant below had, and offered enough upper and harness leather to pay the note, the plaintiff required a due proportion of sole leather, of which the defendant had none, and failing to furnish the same, the plaintiff refused to receive any leather on the note. Thereupon the defendant asked the court to instruct the jury that the plaintiff could not recover without proving a demand of the leather at the place of delivery before the suit was brought; and that it was not necessary for the defendant to set apart, designate, and keep the leather as a payment, in order to discharge himself from the obligation. But the court refused to give this instruction as asked, and in effect charged the jury that no demand was necessary; that, as the stipulations of the note and memorandum required no precedent act on the part of the plaintiff, it was the duty of the defendant to pay, or tender, or set apart, the property of the requisite kinds and quantities at the time and place specified. The court also instructed the jury that the subsequent demand was a waiver of any previous breach, and if the property had been delivered, or tendered, or set apart in payment upon such demand, or if it had been done in a reasonable time thereafter, and notice thereof given to the plaintiff, it would have been a sufficient performance, in default of which the contract would be again broken. Verdict and judgment for the plaintiff for the balance due on the note.

To these proceedings various objections have been urged, which may be comprised under three heads.

1. In order to enable the plaintiff to recover on the note, was a previous demand of the property necessary? Agree-

able to the prevailing current of American decisions, it is not necessary to prove a demand of payment in an action on a promissory note, payable at a particular place, in order to enable the plaintiff to recover against the maker, though it would be otherwise when the recovery is sought against the indorser. 11 Wheat., 171; 17 Mass., 389; 15 Pick., 212; 4 Conn., 465; 3 N. H., 33; 8 Cowen, 271; 3 Wend., 13; 6 Ala., 701, 865; 8 Port., 346; 1 How. Miss., 230; 3 Pike, 389; 1 Scam., 466, 578; 13 Peters, 136; 8 Vt., 191.

The decisions upon this point, it is true, refer mainly to notes payable in money, and not in specific articles. But we think no good reason can be given why the rule should not be as applicable to property notes as it is to those which are payable in money, especially in this state, where, by statute, an instrument of writing or a contract in the form of a promissory note, payable in articles of personal property, is rendered negotiable, and is treated as a promissory note in all particulars affecting the rights and liabilities of the party thereto. Rev. Stat., 451, 555.

In Vermont, where notes payable in specific articles occupy nearly the same commercial relation that they do in this state, (*Denison v. Tyson*, 17 Vt., 459,) no demand is necessary before bringing suit on a note payable in specific property on a day specified. *Elkins v. Parkhurst*, 17 Vt., 105. The court say in that case that a special demand has never been held necessary when a day certain is fixed for the payment of the specific articles. And in *Fleming v. Potter*, 7 Watts Pa., 380, no demand was held to be necessary.

The obvious interpretation of the promise made by the note in this case is, that the specific kinds and quantity of leather should be ready for the plaintiff at the place and on the day specified. The promise is without condition; it contemplates no preliminary act or precedent demand, but undertakes an absolute performance by the maker, whether the holder of the note is present at the time and place to receive the specific articles or not. The absence of the plaintiff could not exonerate the defendant's

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liability to have the property ready for him, according to the stipulations of the note. If the defendant had shown that he was ready to deliver the specific articles, according to the tenor and effect of the note, but did not designate and set them apart, it would then have been incumbent on the plaintiff to prove a subsequent demand, or a refusal by the defendant to make the payment. *Conn v. Gano*, 1 Ohio, 211, Ham., 486. But we do not deem it necessary to enlarge upon this point, for the uniform course of American decisions shows, that when the suit is against the maker of a note, or the acceptor of a bill of exchange made payable at a specified time and place, it is not necessary, in order to maintain the action, to aver, or prove on the trial, that a demand of payment was made; and this doctrine we consider applicable to notes payable in specific articles.

2. The next question to be considered is, Was it necessary for the defendant, in order to discharge himself from his obligation, to show that he had paid, or tendered, or set apart the leather as payment of the note? By the instruction to the jury, the court below decided this question in the affirmative, and this, it is claimed, was erroneous. The authorities do not appear to run in the same current upon this point, but the better opinion appears to be that if the debtor makes a tender of the specific articles he has promised, *and properly designate and set them apart*, at the time and place stipulated, and the creditor is not there to receive, or refuses to accept the property, the debt is thereby discharged, and the right of property in the articles thus designated and set apart, passes to the creditor. *Slingerland v. Morse*, 8 John., 474, 478; *Sheldon v. Skinner*, 4 Wend., 528; *Lamb v. Lathrop*, 13 *ib.*, 95, 97; *Garrard v. Zachariah*, 1 Stewart's Ala., 272; *Thaxton v. Edwards*, *ib.*, 524; *Smith v. Loomis*, 7 Conn., 110; *Robinson v. Batshelder*, 4 N. H., 46; *Gilman v. Moore*, 14 Vt., 457; 2 Kent's Com., 507; *Zim v. Rowley*, 4 Barr., 169.

Johnson v. Baird, 3 Blackf., 153, 182, was an action on a promissory note payable in hats at a certain time and

place. The defence set up was, that at the time and place the note became due the defendant was ready with the hats, to pay and discharge the note, but that no person attended to receive them; that he had always been and still was ready to deliver them at the place appointed, if the plaintiff would attend to receive them. This was held to be a good defence to the action. But the case was decided upon the sufficiency of a plea of readiness to perform, in which the *uncore prist* was fully averred. In connection with that decision the court say, "that when the defendant elects to avail himself of such a defence, and retains the articles in his possession, he is bound at his own peril and risk to keep them safely and deliver them to the creditor on his demand; and should he neglect or refuse so to do, he is liable in an action of trover or conversion;" and they further say, that by his plea he acknowledges his duty to so keep and deliver the articles, and makes the whole a matter of record by which he is for ever bound. This reasoning of the court clearly shows that something more than a mere readiness to pay must be proved in order to discharge the defendant from all liability on the contract. In order to keep those particular articles safe for the creditor, they must have been *set apart* or designated as the property of the creditor, and not remain indiscriminately commingled with like articles retained by the debtor or owned by others. And in the same opinion the court admit that the defence would be clearly unavailable, if it merely set up "that the debtor was ready at the time and place of payment with the articles, but that no one was there to receive them." 3 Blackf., 188. So in *Dorman v. Elder, ib.*, 490, where it was pleaded in bar to an action of covenant, for the non-delivery of hogs worth a certain sum, by a specified time, that the hogs were set apart at the time stipulated, and that the plaintiff failed to attend, it was held that the plea should have stated the number of hogs so set apart, and also that they then were left at the place for the plaintiff, or that they were and always had been ready to be delivered. In these decisions

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we can see nothing to militate against the propriety of the instructions in the present case. They certainly require something more to bar such actions than a mere readiness to deliver the property at the time and place appointed. The property should, at least, be set apart and designated for the benefit of the creditor. We conclude, then, that the court below, in charging the jury, did not require more proof than would have been necessary to discharge the defendant from his obligation.

3. So far as the concluding instruction of the court is concerned, we think the plaintiff in error has even slighter grounds for objection. The subsequent demand being a waiver of any previous breach, the defendant had a second opportunity to deliver, or tender, or set apart the specific articles, in payment of the note upon such demand. To this instruction we can see no legal objection, nothing in it that could result in hardship or inconvenience to the defendant. But the court went still further in his behalf, and instructed the jury, that if the property had been set apart as payment in a reasonable time after such demand, and notice thereof had been given to the plaintiff, it would have been a sufficient performance. The plaintiff in error at least has no right to complain of this branch of the charge. It was as favorable to him as it well could be, in affording him a reasonable time after the subsequent demand to discharge the note in leather. His failure to deliver the leather on such demand gave the holder of the note an immediate right to his action; and it may well be questioned, whether he was under obligations to delay it even a reasonable time for such a notice.

Judgment affirmed.

Wright and Knapp, for plaintiff in error.

J. C. Hall, for defendant.

CROOKSHANK *et al.* v. MALLORY.

A party cannot avail himself of his own objections to work done for him and his refusal to accept, as a reason for not paying for it; nor can he give in evidence his own acts and declarations, in order to show that another party has failed in his contract to him.

Where a dwelling frame is defectively erected, but still is of substantial value to the defendant, for the purpose intended, the plaintiff would be entitled to a compensation, to be ascertained by deducting from the contract price so much as the frame was worth, less than it would have been if completed according to agreement.

It was not necessary for the defendants to accept the dwelling in order to justify a recovery against them.

A mere right to a reduction of plaintiff's demand, in consequence of defects in the work for which it was charged, is not a demand which can be brought in as a set-off against plaintiff's demand.

A set-off must be predicated upon an independent demand.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by GREENE, J. An action of assumpsit by Samuel Mallory against Jesse and James J. Crookshank, in which the plaintiff recovered a verdict and judgment of 25 cents.

The suit was for work under a written contract to erect a frame for a dwelling, and also a frame for a kitchen attached to the same, under a separate contract. It appeared on the trial that the defendants had finished off the kitchen part, and were living in it, and had left the main building unfinished, alleging that it was not framed in a workmanlike manner, nor within the time stipulated by the contract.

1. The defendants gave evidence tending to prove that they had paid most of the contract price for the dwelling frame, before it was finished; that on the day it was raised and the defects appeared, they objected to them, and to those parts that were incomplete; that they then, and have ever since refused to pay the balance due on the contract, in consequence of these defects; and that they had always refused to accept the dwelling frame from the

plaintiff. This evidence was excepted to, and was ruled out by the court. To this ruling objections are urged, but we think the court acted correctly. The defendants could not avail themselves of their own objections and refusals as a justification for not paying a debt. A party cannot give evidence of his own acts and declarations in order to show that another party has failed in his contract to him.

2. It is objected that the court charged the jury, that if the dwelling frame was defective in some particulars, and not entirely completed within the time, and in the manner specified, but was nevertheless of real substantial value to the defendants for the purpose intended, the plaintiff would be entitled to a compensation, to be ascertained by deducting from the contract price so much as it was worth, less than it would have been if completed according to agreement. There is nothing pointed out to us in this instruction that is not perfectly consistent with the contract, or that infringes upon any principle of law. The doctrine involved in this instruction was fully recognized by this court in *Davis v. Fish*, 1 G. Greene, 406. We there say, that "the rule is settled beyond question, that if a job of work is of some use and value to the employer or vendee, though improperly done, or not within the stipulated time, still the workman or vendor is entitled to recover as much as the work is reasonably worth; making such allowance as the circumstances may require." Under this rule, the above charge to the jury was obviously correct.

3. The court then instructed the jury that, to enable the plaintiff to recover, it was not necessary that defendants should have taken the dwelling frame off his hands. This instruction is also unexceptionable. Such an improvement attaches to the realty. It is a part of the land, and passes to the owner with his possession of the land, without the formality of a delivery and acceptance.

4. The defendants gave evidence, tending to show that they had sustained damages by plaintiff's defective per-

formance of the contract ; and they then asked the court to direct the jury to treat such damages, if they found any, as so much set-off ; and if, in striking a balance, any thing should be due the defendants, they should return a verdict in their favor for such a balance. But the court refused to give such direction to the jury. To this ruling the defendants excepted, and now urged the same as error. We think the court decided correctly. It is clear that where a mechanic sues for his labor, and a defence is made by setting up damages for defective work, such damages can only be used as a defence against the plaintiff's claim, and not as a ground of action in the nature of set-off ; by which the defendant may recover over against him. The statute provides that a defendant may set-off "any demand" he may have against the plaintiff. Rev. Stat., p. 318. The defendants in this case set up no demand against that of the plaintiff, but sought rather to destroy his claim by showing that the work was not properly done. A set-off must be predicated upon an independent demand, which a defendant has against the plaintiff. But in this case, the defendants attempted to set-off a claim which resulted from and depended upon the demand of the plaintiff. Had the defendants recovered a verdict, it would not have been the result of their demand against the plaintiff, but it would have been by the avoidance or destruction of the plaintiff's demand against them. If the plaintiff had no demand, the defendants had nothing against which they could place their set-off ; and if the plaintiff's demand was legal, then the defendant's claim would necessarily fail, because it depended upon the fact that it was not a legal demand.

True, if the plaintiff had failed in the performance of his contract, the defendants may have had a claim against him for damages ; but a recovery could only be had in a cross action. The defendants had their election to sue for damages, or to *recoupe* their damages, when sued for the price of their work.

We find in Chitty on Con., 656, that "a set-off means a

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cross claim, for which an action might be maintained by the defendant against the plaintiff, and is very different from a mere right to a *reduction of his demand* or claim to defeat it, on account of some matter connected therewith." This explanation from Chitty shows that the court below properly refused to direct the jury as requested by defendants.

Judgment affirmed.

H. M. Shelby and *J. H. Cowles*, for plaintiffs in error.

Wright and Knapp, for defendant.

DEPEW v. DAVIS.

Affidavits may be admitted in support of a motion to recommit an award to arbitrators, and if no objection was raised to the affidavit in the district court, none will be entertained in the supreme court.

An award may be recommitted under the statute, where a legal and sufficient reason is given. A reason that will justify an arrest of judgment or a new trial, will justify a recommitment.

An award should not be rejected, unless a want of jurisdiction is apparent in the arbitration.

An award may be recommitted on the ground of newly discovered evidence.

ERROR TO JEFFERSON DISTRICT COURT.

Opinion by GREENE, J. In 1841, A. J. Davis and W. Depew entered into an agreement by which Davis was to furnish goods at Fairfield, and Depew was to sell them there, for one fourth of the profits. Under this agreement the parties carried on a large business for three years, and then found it impossible to settle the accounts between them. They finally agreed to have their accounts settled by referring them to arbitrators, whose award should be filed for judgment under the statute. The arbitrators found a balance in favor of Depew of \$311.60. The award was

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filed in the district court, where Depew moved for judgment, and Davis moved to recommit. The two motions were heard together before Hon. C. Mason in 1845. The court ordered that the award be recommitted to the same arbitrators.

Depew now claims that Davis failed to make out a proper case for recommitment. The motion for recommitment sets forth the following reasons: 1. It was contrary to the evidence. 2. Several items were not considered, through inadvertance of arbitrators. 3. The arbitrators rejected several items in violation of a written agreement. 4. Mistakes were made in calculations. 5. Davis has, since the submission, discovered new and material testimony to sustain and prove one item of his account, amounting to more than \$3600, which item was rejected by the arbitrators; and which evidence he did not know of at the time of the trial. The facts stated in the motion were supported by affidavits of Davis, of G. W. Howe, and others.

It is now objected, that *ex parte* affidavits should not have been admitted in support of the motion to recommit. It appears that these affidavits were admitted in the court below, without exception. To these affidavits we see no legal objection. If inadmissible, the objection should have been raised at the time they were presented; it cannot now be entertained. As no objection was made, we must conclude that there was no error in admitting and acting upon the affidavits.

By these affidavits, new and important evidence is disclosed, which would be likely to produce an entirely different result in the award of the arbitrators. One of the witnesses testifies that he has discovered, from an examination of the books, that a part, if not the whole, of \$3600, in goods, were furnished to Depew by Davis, and which were not included in the award submitted. The affidavits show that other testimony could be produced by Davis which would tend to prove the same fact, and the other exceptions made in the motion to recommit. The record

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does not purport to give all the evidence upon which the court below acted in ordering the award to be recommitted. If, then, we should not consider the affidavits before us sufficient to justify the action of the court below, we could not presume that the court had not some additional and sufficient reason for recommitting the award.

The statute provides, that "the award may be accepted or rejected by the court, for any legal and sufficient reason, or it may be recommitted to the same arbitrators for a rehearing by them." Rev. Stat., 58, § 9.

The award, then, may be accepted or rejected for any legal and sufficient reason. But the statute does not inform us what reasons shall be legal and sufficient. Are they determined by rules of law, or are they left to the discretion of the court, to be decided upon the merits and circumstances of each particular case? If nothing more than a *sufficient* reason was required by the statute, we could safely conclude that the award might be accepted or rejected at the mere will or discretion of the court. But it appears that the reason must be both *legal* and *sufficient*. A legal reason must be one which is recognized by some established rule of law. As the statute does not define the legal reasons which should prevail in such cases, our courts must necessarily be governed by common law principles, which are applicable to analogous propositions. That which would be considered a legal reason for arresting a judgment, setting aside a verdict, or even for granting a new trial, might very justly be considered by a court a legal and sufficient reason for rejecting or recommitting the award of arbitrators. In all such cases, it is true that courts of justice are invested with large discretionary powers; still, that power should in all cases be governed by rules of law, so far as applicable. Had the legislature intended that the court should dispose of the award at discretion, they would not have used the words "*legal* and *sufficient*." By the use of these words, they obviously intended that the court should be governed by recognized rules of law, so far as applicable.

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But it is said that the words "legal and sufficient reason" occupy such a position in the sentence that they only qualify the power to reject the award, and that the power to recommit may therefore be exercised at the will of the judge. True, according to the strict rules of syntax, the power to recommit is not qualified by those words; still we think the legislature intended such qualification. If not expressed, the words may at least be understood as applicable to that power. As implication should not favor arbitrary power, but should support legal rules and practice, we have no difficulty in applying the qualification to the power of the court in this particular.

The fact that a writ of error will lie to reverse the order of rejection or recommitment of an award, adds weight to the conclusion, that the power to reject or recommit is not intended to be exclusively discretionary, but should be exercised according to fixed rules of law. A writ of error will not lie to review or regulate a power which is merely discretionary. A case should only be reversed on error, when some rule of law has been violated. A writ of error is only applicable to a decision at law, and not to a decision at will.

In giving this construction to that section of the statute, we cannot agree with counsel for the plaintiff in error, that it confers no power on our district courts over awards, but such as they might exercise at common law, independent of the statute. Unless the legislature intended to confer other and additional powers, why was the section enacted? If intended merely to confirm the common law power which the court already possessed, why was it not so expressed? Clearly the legislature intended something by the section: they intended to confer an authority which could not otherwise be exercised by the district courts in relation to awards; they intended to confer an additional authority, a sound discretionary authority, to be regulated by additional "legal and sufficient reasons." They were still authorized, as before the act, to reject or recommit, for the common law reasons of fraud or mistake, or want

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of jurisdiction; and they were also authorized by the act to reject or recommit for other "legal and sufficient reasons." And these other legal and sufficient reasons must be deduced from analogy of law and analogy of circumstance. That which would not be a legal reason to arrest a judgment, set aside a verdict, or grant a new trial, should not be considered a legal reason to reject or recommit an award. As a new trial should always be allowed if the verdict is contrary to law, or works manifest injustice to the party applying; (*Cook v. The State*, 1 G. Greene, 56;) or if, by any reasonable cause, a party has not been able to present the merits of his case to the jury; (*Jones v. Fennimore*, *ib.*, 134;) so, for like legal and sufficient reasons, should an award be recommitted to arbitrators.

But little inconvenience can result to the parties by recommitting an award to the same arbitrators, as it would only be necessary for them to reconsider the points upon which it was returned to them; therefore we can see no good reason why a stronger case should be required for the recommitment than is necessary to justify a new trial. Where legal and sufficient reasons induce the belief in the court that manifest injustice has been done by a verdict, a new trial should be granted; and when the same reasons justify the belief that like injustice has been done by an award, it should be recommitted.

But to justify a court in rejecting an award, we think stronger and more obvious reasons should be adduced. A motion to reject should only be granted where a want of jurisdiction is apparent. The jurisdiction of arbitrators is derived from the contract of submission, and is limited by it. There is a want of jurisdiction where it appears that there was a want of notice, or appearance of the party; where more or less has been considered than was submitted; where the award is published after the time limited, or where it is partial or interlocutory, when required to be complete and final. If the arbitrators kept strictly to their jurisdiction, we think their award should

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not be rejected. But where it appears upon the face of the award, or by extrinsic, legal and sufficient proof, that injustice has been done in any important particular, the award should be recommitted.

It is properly urged, that as awards are made by judges selected by the parties themselves, they are entitled to great respect. Arbitration and award are so peculiarly appropriate to the adjustment of complicated accounts, so well calculated to avoid expensive and protracted litigation, so simple and cheap in their proceedings, as to be adapted to every state and condition of society, and so well calculated to secure peace, harmony, and prosperity in all business and social relations, that they should be encouraged by every enlightened system of jurisprudence. Still, as no system can be entirely free from fraud, mistake, or injustice, our statute wisely prevents an award from being regarded conclusive as to the law or the facts, by providing that for good and sufficient reason it may be rejected or recommitted.

The proof submitted to the court below, in the case at bar, as before remarked, showed that the party had discovered new and important evidence after the award was made, which might materially change the result. This would have been a legal and sufficient reason to induce a new trial, and therefore justified the court in recommitting the award. Besides, from the state of the record, from the fact that it does not purport to give all the evidence, we may infer that other legal and sufficient reasons were submitted to the consideration of the court, which justified the recommitment.

Judgment affirmed.

C. Olney, for plaintiff in error.

J. C. Hall, for defendant.

Wright v. Ross.

WRIGHT v. ROSS.

The action of detinue will lie in Iowa, and may be maintained for a pistol, or any other chattel that may be so identified as to be recovered in specie. A statement before a justice of the peace is sufficiently specific in detinue, which describes the property as "a six barreled pistol, called a six shooter or revolver."

The official return of a justice cannot be impeached by the mere traverse plea of a party or his attorney, where the record shows no evidence to support it.

Where property is taken from a borrower M, by unavoidable force, and the bailor seeks to recover it in detinue from W, it was held that M is a competent witness for the bailor.

ERROR TO WAPELLO DISTRICT COURT.

Opinion by GREENE, J. W. G. Ross commenced an action of detinue before a justice of the peace, to recover a pistol from G. M. Wright. Plaintiff recovered judgment, and the defendant took the case to the district court by writ of *certiorari*, where the judgment of the justice was affirmed. Upon the trial of the *certiorari*, the following questions were raised and decided in the affirmative: 1. Is a pistol such property as may be sued for, in an action of detinue? 2. Is the description of the property sufficiently specific? 3. Was May a competent witness for Ross? It is now contended, that these propositions should have been decided in the negative, and that the judgment of the justice should have been reversed. As these points were respectively urged in the argument, we will give to each a brief notice.

1. Is a pistol such property as may be sued for in an action of detinue? This action has nearly fallen into disuse, and has given place to the more usual actions of replevin or trover. Still it is not forbidden by statute, nor is it altogether obsolete, and may therefore be maintained by our courts where properly instituted. Detinue can only be maintained for the recovery of a personal chattel in specie. Stephen on Pl., 16. The thing sought to be re-

covered, then, must be capable of being distinguished from all others. A horse, a cow, a slave, &c., are objects that were commonly recovered in this action. But it has been held, that the action will not lie for a bushel of grain, nor for any article that cannot in its nature be distinguished from others. Co. Litt., 286, b; 3 Bk. Com., 152. The goods sought must be so distinguishable from other property that, if the plaintiff recover, the sheriff may be able to deliver the identical goods to him. 1 Chit. Pl., 121-3. Hence a deed, or money, or corn in a bag or chest, may be recovered in this action.

The question arises, Is "a six barreled pistol, called a six shooter or revolver," so distinguishable as to come within the rule laid down by the authorities? If such a pistol can be readily identified, if it can be certainly ascertained from other pistols, and proved to be the specific property sued for, it clearly follows that it is such a chattel as may be recovered in an action of detinue. A six shooter or revolving pistol may be as readily designated as a horse, a cow, a slave, a bag of money, or a sack of wheat; and for all these objects detinue has been commonly maintained. It was held in *Mansell v. Israel*, 3 Bibb., 510, that detinue will lie against executors or administrators, for money obtained by them in that character.

It has been held, that detinue will lie for a negro woman by name without stating her complexion or age; also for a cow without describing her color, or for a certain number of knives and forks without a particular description. *Haynes v. Crutchfield*, 7 Ala., 189. If such articles can be sufficiently identified to justify the action of detinue, it is obvious that an object so rare as a revolving pistol will come within the rule.

2. The next question raised is, Does the complaint filed before the justice set forth a sufficiently explicit description of the property? It is described as "a six barreled pistol, called a six shooter or revolver." This description, it is true, is rather general; it is not as specific as it might have been, it is more descriptive of the class to which the

pistol belongs than of the pistol itself. But still we think the description substantially sufficient, even if the action had been commenced in the district court. The description is as specific as is ordinarily required, either in trover or detinue. Swan's Pr., 585, 589, note 1. In *Haynes v. Crutchfield*, 7 Ala., 189, a much more general description was held to be good.

Besides, this case was commenced before a justice of the peace, where nothing more than a brief statement of the nature of the plaintiff's demand or cause of action is required. Rev. Stat., 314, § 1.

3. It is objected that May, an interested witness, was permitted to testify in behalf of plaintiff. It appears by the justice's amended transcript, that May was offered as a witness, and that defendant's counsel required him to be sworn as to his interest in the event of the suit; that witness answered, that he did not consider himself interested, and that plaintiff offered to execute a release to witness, but it was not required by defendant's counsel.

The return was traversed by defendant's counsel. This traverse states, that May swore that he borrowed the pistol of Ross, and that it had been unexpectedly wrested from him by Wright, in whose possession it was, and that as Ross had sought a specific recovery of the pistol from Wright, he did not consider himself responsible to Ross. It does not appear that there was any evidence to support the traverse. The court decided, that this traverse did not show that the justice had erred. In this decision we can see no error. The official return of a justice cannot be impeached by the mere traverse plea of a party or his attorney. But even the traverse does not show that May was an incompetent witness. It shows that the pistol had been unexpectedly wrested from May by Wright. It is a rule of law, that if a borrowed article perish, or be lost or injured by theft, accident or casualty, which could not be foreseen or avoided, the borrower is not liable. 2 Kent's Com., 574; Story on Bt., § 240. In such a case the utmost care must be exercised by the bailee; he is liable for slight

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neglect. It may well be doubted whether May's answer on *voire dire*, shows such neglect; it shows that the property had been forcibly wrested from him, and was in possession of the defendant, from whom it might be specifically recovered. The plaintiff, knowing where his property was, preferred such a recovery to an uncertain remedy against May; and it appears by the return of the justice, without denial, that plaintiff proposed to release May, and that thereupon he was permitted to testify without further objection. Admitting the traverse to be correct, we think, under all the circumstances, that the court decided correctly in affirming the proceedings of the justice.

Judgment affirmed.

II. B. Hendershott and B. Jones, for plaintiff in error.

James Baker, for defendant.

CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT OF THE STATE OF IOWA,
IOWA CITY, JUNE TERM, A.D. 1849,

In the Third Year of the State.

Present.

HON. JOSEPH WILLIAMS, *Chief Justice.*
HON. JOHN F. KINNEY, }
HON. GEO. GREENE, } *Judges.*

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The act of 1839, authorizing district judges to hold special terms of court whenever they deem it necessary, was not repealed by subsequent acts passed to fix and change the time for holding court. The eighth section of said act is not repugnant to the organic law, nor to the state constitution of Iowa.

Statutes *in pari materia* should be taken together as one law, and should, if practicable, be so construed that every provision shall continue in force. In a question of construction, all doubt should favor the validity of a law under which rights have been acquired.

Notice of a special term, as directed by the act of 1839, is not an essential prerequisite to confer jurisdiction. The statute providing for the notice is directory. It will be presumed that the notice was given, even if the record does not state the fact.

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"State of Iowa" and "The State of Iowa" are substantially synonymous terms.

Where an indictment appears to have been exhibited in open court, by the grand jury, and is indorsed "a true bill" over the signature of the foreman, it is conclusive evidence that it was duly found by a legal grand jury.

American courts have dispensed with many of the stringent rules and nice technicalities which formerly obtained in the English courts in criminal cases.

The record proper in a criminal case, after stating the time and place of holding court, need only set forth the indictment, properly indorsed as found by the grand jury; the arraignment of the accused; his plea; the impanneling of the traverse jury; their verdict; and the judgment of the court.

Any decision of a court made preliminary to a final judgment, is, *per se*, a part of the record; but all other proceedings, such as motions, exceptions, testimony and the like, are no part of the record unless made so by order of the court, by agreement of the parties, by demurrer to evidence, by special verdict or by bill of exceptions.

Only such matters as are of record can be brought to the notice and review of this court.

Irregularity in proceedings is waived by pleading and submitting to a verdict without objection.

Where, on account of prejudice, interest, or other objection, the sheriff is rendered incompetent, the coroner should perform his duty; but if the party objecting to the sheriff asks the court to appoint an elisor, he by implication manifests an objection to the coroner also, which will justify the court in appointing an elisor.

Where a jury was summoned by the sheriff after the prisoner made affidavit that the sheriff was prejudiced against him, but the jury was not objected to until after the verdict, it was held that the objection came too late, and that the irregularity was waived.

If a case is not submitted to the jury impaneled at a regular term to try the case, a second jury may be impaneled for the trial at a subsequent term.

A prisoner should be present at his trial, and when the verdict is pronounced.

Where the record shows that the prisoner was regularly arraigned, that he was brought into court, and took bills of exceptions, it sufficiently shows his presence during the trial.

The names of the witnesses on whose evidence an indictment is found, should be indorsed on every true bill returned by the grand jury; but they need not be made a part of the record.

Many legal forms and technicalities possess marked utility in practice.

Where the oath required by statute is in substance administered to a jury, it is sufficient.

Where the jury are "sworn the truth to speak upon the issue joined between the parties," it is not sufficient in a trial for murder.

ERROR TO WASHINGTON DISTRICT COURT.

Opinion by GREENE, J. In this case, John C. Harriman was indicted for murdering one David N. Miller. It appears that the prisoner, on being arraigned, pleaded not guilty; and thereupon the court proceeded to impanel a jury. The defendant then made application for a continuance, which was granted. Subsequently, October 30, 1848, a special term of the district court was held. Upon an affidavit previously filed by the defendant, that the sheriff was prejudiced against him, one Robert Rinkade was appointed elisor to return a jury. Only eight of the jurors were impaneled on the first day of the term, and they were placed in charge of the elisor, with directions that they should not be separated, and to have them in court on the following morning. On the second day the panel of jurors was completed, and sworn "the truth to speak on the issue joined between the parties." The examination then commenced, but not being completed, the jury was placed under the charge of the elisor for the night, to be returned into court the next morning. The cause was submitted to the jury on the evening of the third day, when they retired in charge of the elisor to consider their verdict, and on the fourth day returned a verdict of guilty as charged in the indictment. Motions in arrest of judgment and for a new trial were made and overruled; and a judgment in due form and sentence of execution were rendered against the prisoner.

To the proceedings in this case there are twelve errors assigned; the most material of which we will proceed to examine.

1. It is contended that the special term of court was not authorized by law, and, as a consequence, all the proceedings in the case are *coram non judice*. This position is clearly correct if the judges of the district court were not authorized by statute to appoint special terms of their courts. In January, 1839, an act was passed, fixing the

terms of the district courts; dividing the territory into three judicial districts, assigning them to the respective judges; authorizing them to exchange districts as often as they might agree to do so, and to hold courts in each other's district in cases of absence or sickness; and also authorizing each judge to hold a special term of the district court whenever he should deem it necessary, for the trial either of civil or criminal causes. Statute of 1839, p. 128. In the year following, acts were passed changing the time of holding courts in all the districts, but interfering in no other particular with the act of 1839. In 1843, another change was made in the time of holding courts in the second district; and by statute of 1846, p. 12, new counties were attached to each district, and the time was again changed. By the fifth section of this statute all contravening enactments were repealed. There was no feature in this act contrary to that of 1839, which empowered the judges to exchange districts, and to hold special terms of court; consequently these sections continued still in force.

Again, by the laws of 1847, p. 74, a general change was made in the time and an additional district formed; and finally by statute of 1848, p. 51, an act fixing the times and places of holding the district courts in the first judicial district was passed, providing that in Washington county it should be held on the second Monday in March and on the first Monday in September. It is strenuously urged that, as this act expressly fixed the time and place of holding court, and provides for no special terms, that the district judge had no legal power to hold such a term; that these various changes in times of holding the courts, and in the size and number of the districts, have effected a complete repeal of the statute first cited; but in what manner or by what provision of law this complete repeal is effected we are unable to comprehend. In all these changes, and in our transposition from territorial to state government, we see nothing that seriously affects the fifth, sixth, and eight sections of the act of 1839. Their abrogation, however adroitly argued, cannot be legitimately

assumed from any of the reasons and references which have been submitted to our consideration. They still stand before us in bold relief as the sovereign will of the legislature, perfectly compatible with subsequent enactments, *in pari materia*, and we cannot therefore regard them as repealed by the speculative rules of construction which counsel have so ingeniously applied. It must be conceded that acts, *in pari materia*, should be taken together as one law, and so construed, if practicable, that every provision shall continue in force. *Pearce v. Atwood*, 13 Mass., 324, 344; *Holbrook v. Holbrook*, 1 Pick., 248, 254; *Haynes v. Jenks*, 2 Pick., 172, 176; *U. States v. Freeman*, 3 Howard, 556; *Hays v. Hanson*, 12, N. H., 284; *Morris v. The D. & S. Canal*, 4, Watts & Serge., 461; *Harrison v. Walker*, 1 Kelly, 32.

Again, it is quoted in the books as a general and uncontroverted principle, that "although two acts are seemingly repugnant, yet they shall, if possible, have such construction that the latter shall not repeal the former by implication." Bac. Abr. Statute D; *Foster's case*, 11 Coke, 63; *Weston's case*, Dyer, 347. And we have it from quite recent authority that the law does not favor repeals by implication. *Locker v. Brookline*, 13 Mass., 342, 348; *Wyman v. Campbell*, 6 Port., 219; *Goddard v. Boston*, 20 Pick., 407, 410; *McCartler v. Orphan Asylum Society*, 9 Cowen, 437, 506; *Bowen v. Lease*, 5 Hill., 221, 225.

Properly observing the rules which prevailed in the foregoing cases, and applying them with all their force of analogy to the question under consideration, we cannot suppose a well founded doubt can be entertained that those three sections of the statute of 1839 are still in force, and that our district judges possess the legal power of appointing and holding special terms of their courts.

The law of 1848, p. 21, conferring additional powers on the judge of the second judicial district to adjourn regular terms as fixed by law, in order to hold special terms at the same time, is referred to as an argument favoring the repeal of the statute of 1839. But we are unable to see

much force or application in this reasoning. The new statute has no relation or reference to the former enactment. The old law is general in its application, conferring powers and duties generally upon the judges of the district courts; it is confined to no particular judge or number of judges, but has a jurisdiction co-extensive with the state. The new law is confined to one particular district, and confers upon its judge powers unauthorized by the general statute. How can the latter then be regarded as a repeal, even by intendment of the former statute, or be construed into a rational supposition that the legislature regarded it as repealed, even if their regarding a law as repealed would make it so? The courts, the proper tribunals to judge of the force and effect of statutes, have by contemporaneous construction and judicial action recognized the existence and vitality of that statute; and hence, if this could be regarded as a question of doubtful construction, that doubt, from motives of public convenience and policy should favor the validity of the law, in order to preserve undisturbed the rights of parties and titles to property which have been adjusted under its usage. *Rogers v. Goodwin*, 2 Mass., 475, Opn. of the Justices, 3 Pick., 517; *Beals v. Hale*, 4 How., U. S., 37; *The People v. Canal Commissioners*, 3 Scam., 153, 160; and again in this case the rule, that a long and uninterrupted practice under a statute is good evidence of its construction, must have its force. *McKeer v. Delaney*, 5 Cranch, 22; *Morrison v. Barksdale*, Harper, 101.

But it is insisted that, if the eighth section of the act of 1839 has not been otherwise abrogated, it was repealed by the constitution in 1847, which continued in force such territorial laws only as were not repugnant to the constitution; that as our state judicial system is not as the territorial system was, and there having been a general change in the extent and number of the districts, and in the powers and number of the judges, the law in question is repugnant, and therefore inoperative. But we can see nothing in it repugnant to the constitution, or inconsistent

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with our new form of government. We are unable to perceive how the change so often adverted to by counsel can so seriously affect the law in question. Indeed, the same arguments would apply with equal force to vitiate all territorial laws at the adoption of the constitution.

Finally, it is objected that the legislature of the territory had no right under the ninth section of the organic law to pass an act authorizing the judges to hold such special terms of the district court, as they were by said section to be held "at such times and places as might be prescribed by law." Strictly viewing this clause, it may very plausibly be assumed that the courts could be held at such times only as the appropriate law might fix upon and designate. The application of this principle might safely be admitted so far as the regular terms of the courts are concerned; and this concession would not in the least militate against the power of the legislature to authorize the judges to hold special or extra terms of their courts, whenever in their opinion occasion might require. This would be a rightful subject of legislation within the meaning of the organic law, and within the province of the legislative assembly. But had the legislature conferred upon the judges by statute authority to prescribe the times generally of holding their courts, would it not still be done by authority of law? It would still be a regulation emanating from the supreme legislative, and only authorized power within the general spirit and meaning of the organic law, if not within its strict letter. It is not, however, in this discussion necessary to inquire further into the power of the legislature, than that which has been exercised in authorizing the judges to hold special terms of courts. And upon this point, as already assumed, we can entertain no doubt. It is a power that never was judicially questioned, under the territorial organization, and has been too long acted upon to be now successfully controverted. The authority to hold special terms should never be withheld from a court; it may be regarded as a right, which a court of general jurisdiction should exercise *ex*

officio; it frequently becomes indispensable in the administration of justice, and especially in extending to the accused in criminal prosecutions his constitutional "right to a speedy and public trial."

Another objection was urged to this special term, to which we will merely advert. It is contended, that if the court was legally empowered to hold a special term, it was in this instance done without authority of law, because it does not appear by the record that the judge notified the sheriff of the same, or that the sheriff put up at each of the precincts in the county at least three weeks' notice of the time when the special term was to commence. As decided by this court time and again, we must necessarily presume that the officers of the court performed their duty in such particular, unless the contrary appears. An averment of such facts in a record is not necessary. The record being silent, the fact that legal notice was given is established by intendment. There is another reason why this objection cannot now prevail, even if affirmatively before us. It does not appear to have been raised in the court below; but was silently acquiesced in, and waived. The proceedings of the court without such notice were not void. The statute providing for it is merely directory, and such notice is not considered an essential prerequisite to confer jurisdiction. *Friar v. The State*, 3 How. Miss., 422. Such notice, however, being particularly important as a safeguard to the public, and especially to those who may be affected by any special term, it should never be dispensed with by the courts; but the want of it should always be taken advantage of within a reasonable time, and at the proper place. On thus considering the objections raised to the special term, we must conclude that it was authorized by law.

2. It is assigned as error, and urged that the prosecution is not conducted in the name and by the authority of "the state of Iowa," as required by the sixth section in the sixth article of the constitution. It appears that in most of the proceedings the article "the" is omitted, run-

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ning in the name of "*state of Iowa*," instead of "*the state of Iowa*." These terms are essentially the same. The words used designate the party and the state so clearly that they cannot possibly be mistaken for any other party, state or object. The short style, *State of Iowa*, is recognized in the preamble and first article of the constitution. They appear to have been regarded by the framers of that instrument as synonymous terms, and to have been used indiscriminately as the same. Indeed the difference is so trifling, the defect in form so very minute and immaterial, that we cannot regard it as worthy of serious consideration, especially at this late hour—the objection not having been raised, but silently acquiesced in, before the district court.

3. The objection is raised, that the record does not set forth that the indictment was found by a legal grand jury, nor does it contain their names. It appears by the record, that the indictment was exhibited in open court by the grand jury, and over the signature of their foreman indorsed "a true bill." Upon that point, the record states all that is necessary, all that is required by the established practice and usage of our courts. The certificate of the foreman, affirming it to be a true bill, is evidence conclusive and proper that it was duly found by a legal grand jury. *Spratt v. The State*, 8 Mis., 247. If the requisite number of lawful grand jurors had not participated in, and favored the finding and presentment, it would not be "a true bill," as authenticated by the certificate of the foreman. Rev. Stat., 297, § 3; *Turns v. Commonwealth*, 6 Metcalf, 225, 233.

It is, we believe, in pursuance of the English practice, and a prevailing custom in all the states of this Union, for the grand jurors to present the bills found by them in open court, where they openly acquiesce in the finding; and this becomes another proper and strong item of evidence that the bill was found properly and by the required number of jurors. Hence in *The State v. Crighton*, 1 Nott & McCord, S. C., 256, it was held that the finding of a grand jury, having been announced by the clerk in their presence, is good, although not signed by the foreman accord-

ing to the usual practice. A decision to the same effect has been made in our territorial supreme court. *Waukon-char-neck-kaw v. The United States*, Morris, 332. The rules of practice recognized by this decision we do not feel disposed to depart from. Their propriety and expediency not having been questioned, they have been generally concurred in by our courts. In that case, the court were very properly of the opinion that the names of the grand jurors need not be inserted in the transcript of a record from the district court, and that other forms analogous to the English practice might be dispensed with. The cases cited by counsel from Howard's *Miss. Reports* appear to have been predicated upon the old English authorities. But we have long since dispensed with many of the stringent rules and nice technicalities which the courts of that country in mercy established, to shield and protect the prisoner against the harsh and sanguinary penalties of their criminal code for light and often trivial offences. Under the extreme severity of laws, which appear to have been enacted without the slightest regard to human life, and under regulations which did not secure counsel to the prisoner, and seldom a prompt, fair, impartial trial, no wonder that merciful judges, under the promptings of humanity, and being regarded especially as protectors and counsel for the accused, should seize at trifling and unimportant objections to save the lives of those who may have been arrested for ordinary and often doubtful offences. But in this country, where life and liberty are so tenaciously guarded by our constitutions and laws, where a speedy, public and impartial trial is uniformly secured to the accused, where, though destitute of friends or means, he is furnished with able counsel at public expense, and with compulsory process to secure the attendance of his witnesses, and at all times entitled to confront his accusers face to face; here where the accused is entitled to greater privileges than the prosecution in every stage of a criminal proceeding, the reason for such extreme technicality and unmeaning precision ceases to exist. The profound

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policy of the law will not justify the continuance of a rule after all the reasons for it have disappeared.

Recent decisions in England show a commendable relaxation from those rigid technical rules which had been there adopted. These have resulted from the humane modification of their criminal code, which is becoming more characteristic of an enlightened Christian government, and more conformable to the wise and just principles of the common law. In *The King v. Marsh*, Adolph & Ellis, 236, we have a decision in point showing that the English courts are ameliorating their old technical rules to a rational standard. It was in that case decided that the number and names of the grand jurors need not be inserted in the caption of an indictment.

While upon this point, in order to settle the practice and avoid controversy, it may be well for us to express our views as to the essential ingredient of a transcript from the record in criminal cases, when brought to this court for the correction of errors. *McKimney v. The People*, 2 Gil., 540, 551, in an excellent opinion delivered by Judge Lockwood, and which is in many particulars appropriate to the case at bar, it is stated that, "in a criminal case, after the caption stating the time and place of holding court, the record should consist of the indictment, properly indorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanneling of the traverse jury, their verdict, and the judgment of the court. This is all, in general, that the record need state." This we consider a safe rule, comprehending all that is necessary to be enrolled as constituting the record proper in a case. It may be remarked that any decision or judgment of the court in the case made preliminary to the final judgment, becomes *per se* a part of the record, but all other matters and proceedings, such as motions, exceptions, testimony and the like, do not form any part of the record unless made so by order of court, by agreement of parties, by demurrer to evidence, by special verdict, or by bill of exceptions. In one of these methods, everything mate-

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rial or in any way affecting the rights of parties in the proceeding below, may be preserved and brought to the notice and review of this court. And unless so brought before us, or if the transcript of the record does not advert to the fact complained of, we must take it for granted that the proceeding was according to law.

Finally, upon this point, even if the objection under consideration amounted to the irregularity complained of, it was waived by the prisoner's pleading and submitting to a verdict without objection.

4. It is assigned as error that the court appointed an elisor to impanel the jury; and it is insisted that, under the statute, the coroner should perform that duty in all cases where the sheriff becomes incompetent, under the influence of "partiality, prejudice, consanguinity, or interest." Rev. Stat., 195, § 2, 3, 4.

5. It is also insisted that the court erred in permitting the sheriff to act after the prisoner filed his affidavit objecting to him.

6. That the court erred in impaneling the second jury.

It appears by the bill of exceptions, and by the affidavit therein copied, that the proceedings referred to in the last three objections were had chiefly at the especial request of the prisoner. In his affidavit stating the sheriff to be prejudiced against him, he expressly prays the court to appoint an elisor to act in his place. Had the affidavit objected to the sheriff alone, without desiring the appointment of an elisor, the coroner, had there been one, should no doubt have performed the duties; but by desiring an elisor, the prisoner, by strong implication at least, manifested an objection to the coroner, and therefore, for his benefit, the court very properly appointed an elisor. But it appears that the sheriff acted after the affidavit was filed, in summoning the panel of jurors for the special term at which the prisoner was tried, and also in selecting talesmen after the regular panel was exhausted. Had the prisoner or his counsel objected, this would have been palpably irregular, but we are advised by the bill

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of exceptions that it was done "in the presence and hearing of the prisoner without objection on his part; that after the sheriff had summoned several talesmen, the counsel of the prisoner stated that they were unwilling to have the sheriff proceed any further, and requested the court to appoint some other person, and the court, with the consent of the prisoner, directed Robert Rinkade to act as an elisor during the trial. The jury of twelve men who tried the case were not objected to by either party before they were sworn, for any irregularity or informality in summoning any of the jurors.

The objection does not appear to have been raised till after the verdict, when it was urged in support of the motion to arrest the judgment. This we regard as a sufficient answer to these objections. The proceedings were either at the request, or met with the acquiescence of the accused, and he should not now be permitted to come in and take advantage of slight and unimportant irregularities, which took place mostly for his benefit, and at his request. We freely concede the correctness of the principle in criminal cases, and especially when human life is at stake, that the prisoner is to be considered as standing on all his essential rights, and as waiving nothing as to material irregularity which may detract from a fair and impartial trial; but we can see nothing in those before us, which could injuriously affect the rights of the accused, or in any way work injustice or hardship upon him; nothing of which he now has a right to complain. The authorities cited by counsel for the state sufficiently confirm the correctness of the principle we have hitherto followed, that it is too late after verdict to object to irregularity in the manner of impanneling the jury, when no objection was raised on the trial.

But independent of this rule, which disposes of the question, the objection raised to the second jury could not be sustained. The jury impaneled at the regular term of the court were necessarily discharged after the prisoner's application for a continuance was granted; and the ad-

journalment of that term of the court, which, it appears, immediately followed the continuance of this cause, necessarily dissolved the regular panel of jurors, which was only summoned for that term. A new *venire*, another jury became indispensable for the special term, and for the trial of the prisoner. Clearly there was no other course for the court to adopt, and we think it would puzzle even the ingenious counsel in this case to point out any plausible alternative.

7. It is assumed that the prisoner was not present at the trial and when the jury rendered their verdict, and that the fact of his presence must appear affirmatively of record.

The right of a prisoner to be present during the progress of the trial, and when the verdict is rendered, cannot be questioned. The right "to be confronted with the witnesses against him" is guaranteed by the constitution; and it is essential that he should be present when the verdict is rendered, in order to exercise the right of polling the jury. This is generally regarded by courts as an important incident to a jury trial. In New York, the practice is to give either party the privilege of having the jury polled at any time before the verdict is recorded. *Fox v. Smith*, 3 Cow., 23; *The People v. Perkins*, 1 Wend., 91. The courts of Massachusetts and South Carolina deny this right. *Commonwealth v. Roby*, 12 Pick., 496, 512; *State v. Allen*, 1 McCord, 525. But the practice of the New York courts in that particular, and which also prevails in England, has been adopted by most of the state courts in this country, and being more conformable to the rights of parties, we are of the opinion that the rule should continue to obtain in Iowa. In order to secure this important right to prisoners, then, it is necessary that they should be present at the time the verdict is pronounced. But does it appear by the record in the present case that the accused was not in court during the trial or when the verdict was returned? We think not. He appears to have been regularly arraigned, and the record entry of the day on which his trial commenced declares that the prisoner was brought

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into court; and the entry of the day on which the verdict was rendered refers to the prisoner at the bar; and again his presence is sufficiently shown by the bill of exceptions. And even if the record after the arraignment remained perfectly silent upon this point, we could not by implication conclude that the judge neglected his duty in this particular; but we should rather suppose, by legal intendment, till the contrary appears, that the court had performed its duty in all those particulars, and had extended to the accused his constitutional and legal rights.

8. There are three errors assigned, which may be considered under one question. Is it necessary that the transcript of the record should set forth the names of the witnesses upon whose evidence the indictment was found? They unquestionably should be indorsed upon every true bill returned by the grand jury to the district court; Rev. Stat., 297, § 3; but it by no means follows that they should necessarily become a part of the record in a case; it is not usual to have them so incorporated, nor does it come within the rule we have given in this opinion. It is one of those facts which a court will always presume favorable to the correctness of the proceeding. Again, if the names of the witnesses were not indorsed upon the indictment, the objection should have been raised before the district court, otherwise it will be considered as waived. In effect at least, this question was so decided by this court at Burlington in *Ray v. The State*, 1 G. Greene, 316.

In thus confirming the action of the court below upon these various points, it may be well to observe, that we have been in no small degree influenced by the liberal policy of our criminal code, in dispensing with many of the forms and technicalities which have prevailed to an alarming extent in the administration of criminal jurisprudence. We are admonished by the many failures in prosecutions for heinous offences, that the imperative duty devolves upon courts to disregard unsubstantial forms and unmeaning technicalities, and to look more to the substance and merits of each case. This is necessary to preserve

the majesty of law, and to promote principles of peace, equality and justice.

But we do not wish to be understood as entirely disregarding legal forms and technicalities. There are many, very many, which possess marked utility, and which exercise a wholesome restraint and salutary influence in practice. These become matter of substance, and should therefore be adhered to, especially those of an established character, which impart uniformity, stability, certainty, and solemnity to judicial proceedings. Among the most important of these we class the form of an oath required by law to be administered to the jury in the trial of a criminal cause; which leads us to the only remaining question worthy of consideration in this case.

9. It is alleged that the oath of the jury as shown by the record was illegal. The record sets forth that the jury were "sworn the truth to speak upon the issue joined between the parties." This appears to have been the form of the oath administered to the jury, as a qualification to try a prisoner upon an issue involving life or death. It is so deficient in substance, so barren of solemnity, of essential declarations and restrictions, which should be required as the most imposing moral and legal restraint from those who are intrusted with the life and destiny of a fellow-being, that we can under no rule of practice affirm the judgment which resulted from their verdict. Rev. Stat., p. 298, § 5, requires that the oath or affirmation of petit jurors in criminal cases shall be as follows, to wit: "You solemnly swear (or affirm,) that without respect to person or favor, or fear, you will well and truly try, and true deliverance make, between the '*State of Iowa*' and the prisoner at the bar, whom you shall have in charge, according to the evidence given you in court, and the laws of this '*state*,' so help you God." This is the oath, which, under the requirements of our statute, should have been administered to the jury. Had their oath contained the substance of this in any other form, we should, after verdict, have regarded it as sufficient. Or

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had the record remained silent upon this point, we should have presumed that they had taken the legal oath. But as it is, as the record discloses so obvious an error, the judgment must be reversed, and a trial *de novo* awarded.

Judgment reversed.

Dissenting opinion by KINNEY, J. I most respectfully dissent from so much of this opinion as authorizes the word "*The*" to be left out in the style of the process in criminal prosecutions. The constitution provides that the style of the process shall be "*The State of Iowa*," and all prosecutions shall be conducted in the name and by the authority of the same. Art. 5, § 6, Con.

The word "The" is as much a part of the style of the process as either of the other words designated. It takes all the words to constitute the style; one can be left out with as much propriety as the other. I cannot for a moment sanction a departure from what appears to my mind so plain a constitutional requirement. A strict adherence to constitutional provisions is the only safety for courts of justice.

D. Rorer and J. C. Hall, for the prisoner.

A. H. Patterson and E. H. Thomas, for the state.



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An indictment is good which clearly states all the facts necessary to constitute the crime of murder under the statute.

An indictment need only state such facts as are required to be proved.

If a criminal act has been committed in one county, and consummated in another, the offender may be indicted in either county.

Where a mortal blow was inflicted in Scott, from which death took place in Muscatine county, it was held that the latter county had jurisdiction.

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The statute which provides that, "When a person shall commit an offence on board of any vessel or float, he may be indicted for the same in any county, through any part of which such vessel or float may have passed on that trip or voyage," is not confined to that part of the trip or voyage which had been performed before the offence was committed, but it extends to the entire trip.

A prisoner cannot complain of proceedings which were beneficial to him, and in compliance with his request.

Where depositions are taken by the procurement and for the benefit of a prisoner, and are not read to the jury by his counsel, they may be read by counsel for the state, if they were filed and properly in the custody of the court.

ERROR TO MUSCATINE DISTRICT COURT.

Opinion by WILLIAMS, C. J. At the October term of the district court of Muscatine county, Henry Nash, the prisoner, was indicted for the murder of one Littleton J. Reddin. The record shows that Nash was, at the time of the finding and filing of the indictment, in custody. He at that term appeared, and by his counsel moved for a continuance of his cause. At his instance the cause was continued for trial until Tuesday the 21st day of November, to which time the court was adjourned. The court at the same time, upon the request of the prisoner accompanied by a proper showing, entered an order granting leave to take the depositions of witnesses to be used on the trial of the cause, "if it should be made to appear to the court that personal attendance of the witnesses could not be procured by proper diligence."

It was also agreed, by the defendant in person, that the regular panel of jurors of that term might be discharged, and that the judge might issue an order to the sheriff for the summoning of a jury for the trial. The prisoner by his counsel then filed in the clerk's office his notice and interrogatories in accordance with the statute, to take the depositions of witnesses. The record also shows that the cause was not tried on the 21st day of November, 1848, that being the day to which the court had been adjourned; but on the 28th day of that month the court commenced its session for the trial. On that day Nash,

the prisoner, filed among the records of the cause his written acknowledgment that the trial had been adjourned from the 21st until the 28th of November, at his request, and for his own benefit. On the 28th day of November, 1848, the prisoner was duly arraigned, and put in his plea of "Not guilty." The jury was impaneled and qualified, the parties heard, and the prisoner found guilty of manslaughter. After the rendering of the verdict, the counsel of the prisoner made a motion to arrest the judgment, which was overruled by the court, and sentence pronounced.

Several bills of exceptions, during the trial, were taken to the ruling of the court, within which all the points of law relied on by the counsel for the prisoner are set forth, and on which, it is urged here, that error is manifest in the proceedings of the court below.

The following errors are assigned :

1st. The indictment does not clearly charge that the beating and wounding were feloniously done ; nor that the killing was unlawful.

2d. The wounds are not described. The time of the death is not sufficiently set forth. The conclusion is bad.

3d. The indictment is not made up of charges and specifications, as is required by statute ; nor is an indictable offence so clearly charged therein, that a judgment can be given thereon.

4th. The indictment charges that the offence was committed on board a steamboat in Scott county, which boat afterwards passed through the county of Muscatine. The statute gives no jurisdiction in such state of facts to Muscatine county.

5th. The depositions of witnesses were read by the state.

6th. Judgment was against the defendant, when, by the law of the land, there should have been no judgment.

7th. There was no court in session when the pretended trial was had.

The first assignment of error is, that the charge of the offence therein is defective ; "that it does not allege the

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beating and wounding to have been done *feloniously*, nor that the killing was *unlawful*." The first count in the indictment charges that " Henry Nash to wit : on the fourteenth day of September in the year of our Lord eighteen hundred and forty eight, in the county of Scott, in the state aforesaid, wilfully, feloniously, and with malice aforethought, with force and arms did make an assault upon one Littleton J. Reddin, then and there being in the peace of the state, and him, the said Reddin, did beat bruise and wound upon his head with an iron bar, of which beating, bruising and wounding the said Reddin afterwards, to wit, on the eighteenth day of the same month of September, in the aforesaid county of Muscatine, did die ; " and then concludes with the averment, " that the said Henry Nash, in manner aforesaid, did feloniously, wilfully, and of his malice aforethought, commit the crime of murder against the peace, &c., and contrary to the form of the statute in such case made and provided."

The second count sets out the time and place when and where the beating and wounding occurred, adding that it happened on the steamboat " Ohio Mail," " which afterwards passed through the said county of Muscatine ; " and then charges that the said Reddin, on the eighteenth day of the said month of September, of the beating and wounding aforesaid, at the county of Muscatine aforesaid, did die. This count is concluded, also, by an averment that the beating, wounding and killing was done " feloniously and with malice aforethought," whereby the said Nash committed the crime of murder.

The third count sets out the beating and the wounding as having been done on the same day as in the former counts, and that the said Nash, having so beaten, bruised, and wounded the said Reddin " feloniously," and of his malice aforethought, that he, the said Reddin, afterwards " died of the wounds and injury inflicted by said beating and wounding," and concludes, " against the peace, &c."

It is true that in this indictment some of the terms used in setting out the charge of murder are not employed

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in accordance with the old forms which are found in the proceedings at common law, and under the provisions of some of the statutes of the old states, in like cases. There is now a prevailing tendency to simplify legal proceedings, by divesting them of superfluous verbiage and useless repetitions, which can only serve to present the crime so charged in awful sound and form, without giving to or taking from it anything to render it more substantial or distinctive. It is certainly the duty of legislators and judicial tribunals to aid in that advancement and improvement in the judicial procedure of our country, which increase of knowledge by experience and education demands. Every student must be aware of the great difference between the modes and forms in the legal procedure of the courts of the olden time and those of modern date. It is most certainly true that professors of law and jurists may never see the day when they can dispense with such great luminaries as Coke, Blackstone, and their compeers, who in the dawn of proper civil association arose over comparative chaos, and shedding the light of mighty intelligence, drawn from the supreme source of truth and justice, upon the confused and discordant multitude of mankind, marked out and described the line between right and wrong, and taught the means of their ascertainment. Theirs were the master minds, which, in view of the wants of mankind, associated by civil compact, by erecting a mighty system of jurisprudence on principle, rendered the establishment of reason and right feasible among men. They, in their day and generation, acting with a wise reference to the onward moving, upward rising, and expanding spirit of associated *civilized* man, newly modeled the temple of justice, by dispensing with the unmeaning ceremonies which jurists of antiquity had prescribed for the observance of those who would enter its gate and take down the ponderous curtains which darkened the aisle leading to her shrine, leaving all that was by them deemed necessary to support and substantially preserve the edifice. In our day,

the wants of society, as we find them in the advanced and enlightened condition of the civilized world, and the spirit which moves in the life of educated man, admonish those who are called to minister at the altar of justice to lay aside all mere forms and ceremonies, and at the same time carefully to preserve what is necessary in substance to give vitality and effect to principle. Truth and justice are living and eternal principles. To administer justice and truth there must be appropriate system. Well defined rules of action, based on principle, cognizable by the mind of man, are essential to enable him to understand and maintain his rights whilst in the conflict of life. In the ascertainment and establishment of justice between men, so far as the mode or form is concerned in presenting a charge or accusation, it should be intelligible, certain, and definite, truthfully and substantially presenting against the accused an offence known to and defined by the law. In doing this, whether the definition of the offence be by common law or statute, it is requisite that the terms of description prescribed by the law should be carefully observed; more or less than this is not to be required by the courts.

In the formation of the criminal code of our state one of the first things attempted was the establishment of such a system as would be consistent with the spirit of the time in which we assumed civil organization. Such being the design of our legislature, a criminal code was enacted by which offences against the welfare of society and "the peace and dignity of the state" have been defined, and the mode of judicial procedure and practice pointed out. It is the positive duty of courts to observe and maintain the distinction which is clearly enjoined by constitutional law, so as carefully to avoid interference and usurpation of power by either of the several departments of government. Indeed, to the judicial tribunals is this great conservative power confided. To them alone, in the last resort, must the aggrieved party look for relief. It is properly the province of the legislature to alter the

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common law by enactments deemed conducive to the welfare of the state. Such laws emanating from that body are presumed to express the will of the sovereign people, and when enacted within the prescribed limits of the constitution, are binding as the law of the land, and must be observed. It is the imperative and only duty of the courts to expound and enforce the observance of the laws, not to enact them. Then, tested by the requirements of our statutes, defining the offence here charged, and prescribing the practice of our courts under the criminal code, does this indictment contain such "charges and specifications" as are sufficient to justify the court in entering judgment and passing sentence in accordance with the principles of the law of the land? We think it does. It presents the complaint or accusation as commenced in the name of "The State of Iowa," in order that it may "be carried on in the name and by the authority of the same." The venue is laid in the county of Muscatine, as the place of jurisdictional power, where the bill purports to have been found by the grand jury. The day on which the wound was inflicted by the accused upon the person of the deceased Reddin; the day on which he died; the county within which he died; the felonious intent and malice aforethought with which the blow was inflicted; the weapon used and by which the killing was perpetrated; the part of the body upon which the wound was made; and the averment that the death was caused by the wound thus inflicted, with the allegation that the act was wilful and against the statute in such case made and provided, are all charged specifically in each count, except that the last count lays the offence in general terms as having transpired in Muscatine county. Each count is concluded with the charge that, by the specific means and acts therein set forth and described, the accused had then and there committed the crime of murder. Such being the substantial ingredients, in fact, composing the indictment, how do they stand the test of legislative requirement?

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The act defining this crime declares that "murder is the unlawful killing of a human being, in the peace of the United States, (State of Iowa,) with malice aforethought, either express or implied." Rev. Stat., 165, § 4.

The second section of the same act declares, that "the manner of the killing is not material, further than it may show the disposition of mind, or the intent with which the act was committed."

The fourth section enacts that, "In order to make the killing murder, it is requisite that the person injured die within a year and a day after the stroke received, or the cause of death administered."

The act entitled, "An act regulating criminal proceedings," Rev. Stat., 153, § 46, provides, that "the body of the indictment shall be considered as made up of charges and specifications, and no indictment shall be quashed, if an indictable offence is clearly charged therein; nor shall any motion be entertained, with a view to arrest, *reverse*, or set aside any judgment, on account of a defect in the indictment, if the charge upon which the offence was tried be so explicitly set forth that judgment can be rendered thereon."

Section forty-eight of the same act provides, that "nothing need be stated in the body of an indictment which is not required to be proved upon the trial in support of the charge."

This indictment declares that the deceased was killed by the accused Nash "feloniously, and with malice aforethought," and substantially and distinctly avers that the act was done in violation of or "against the statute in such case made and provided." Although the precise term "unlawfully" is not used, still, as it is charged to have been done "against the statute," &c., it must be taken as done unlawfully, and the use of the precise word is not indispensable to aid the language used in the indictment to convey the idea required by the statute as a charge to make up the crime. The statute is the law.

If the act complained of was done in violation of it, it was done unlawfully.

The second assignment of error is answered by the forty-sixth section of the act regulating criminal proceedings cited above, which provides that "no judgment shall be arrested, *reversed*, or set aside on account of any defect in the indictment, if the charge upon which the offender was tried be so explicitly set forth that judgment can be rendered thereon." There can be no mistake as to the offence here charged. All the facts necessary to constitute the crime of murder under the statute, so that judgment in accordance with the law could be rendered, are clearly stated.

The statute only requires such facts to be stated in the indictment as are required to be proved on the trial. This requisition, as we have shown by a statement of the contents of the indictment, has been fulfilled and substantially observed.

It is also contended and urged, for ground of reversal of the judgment of the court below, that "the time of the death of Reddin is not sufficiently set forth." The indictment states that the wound was inflicted on the 14th day of September, A.D. 1848, and that Reddin died, in consequence thereof, on the 18th day of the same month, being four days after he received the wound. This, for all legal purposes, is sufficiently certain and conclusive as to the time of his death, being within the limitation prescribed by the statute, in which the death must occur to make the killing murder.

An objection is also made to the validity of the indictment, because the wound is not particularly described. We know that precedents are numerous in which particular description of the wound, as to length, depth and breadth, is set forth, and that they have been followed even till the present day by some who are learned in the legal profession. Such particularity cannot vitiate an indictment, and may serve to enlarge and render it quite formidable and imposing; but as the law is now, under

the provisions of our statute, this is not requisite. So far as the wound is concerned, it is sufficient to aver that it was inflicted by the accused on the person of the deceased, that his death was caused by it, and that the act was done within the jurisdiction of the court.

Enough has been presented to show that the validity of the indictment is not successfully assailed by the 1st, 2d, and 3d assignments of error, and that with reference to them the judgment of the court is in accordance with the law.

It is contended that the district court of the county of Muscatine had not legal jurisdiction of the offence, and proceedings thereon; that the act was perpetrated in the county of Scott, on board of a steamboat, and that the boat *afterwards* passed through the county of Muscatine. The blow was given, and the wound, of which the deceased died, was inflicted in the county of Scott. From thence the boat, on which the parties in the transaction were, passed down the river, and stopping at the town of Bloomington, in the county of Muscatine, the wounded man, Reddin, was taken ashore, and Nash, the prisoner, was committed to prison, there to await his trial. He was there tried and convicted.

Here again, the legislature of the state, foreseeing the possibility of such occurrence, and the necessity of providing for it, by convenient and positive enactment, have prevented the success of such objection. Rev. Stat., 153, § 42, provides, that "where a criminal act has been committed in one county, and consummated in another, (as where the mortal blow was given in one county, and the death took place in another,) the offender may be indicted in either county." The application of this act to the case at bar is too obvious to allow of any discussion. "The mortal blow was given" in Scott county, "and the death took place in" the adjoining county of Muscatine. The statute, therefore, conferred jurisdiction of the case on Muscatine county.

But it is further contended that the offence was com-

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mitted on a steamboat, and that the boat afterwards passed through the county of Muscatine, and in such case the statute confers no jurisdiction. This objection is put upon the peculiar language of the statute relative to the commission of offences on steamboats or other vessels, passing upon a voyage by, or through the state. Rev. Stat., 152, § 39, enacts that, "Where a person shall commit an offence within this territory (state) on board of any vessel or float, he may be indicted for the same in any county, through *any part* of which such vessel or float *may have passed* on that trip or voyage." The point made here by the counsel for the prisoner is that the indictment was found, and trial had in a county through which the boat passed *after* the mortal wound was given, or the offence committed; and, therefore, the act of the legislature applying to counties, or part thereof, through which the vessel had previously passed, conferred no jurisdiction on that county.

What is the obvious intent of this act? Clearly to prevent the escape, with impunity, of offenders against the law, by securing their arrest, in case of the commission of crime on vessels afloat within the jurisdiction of the state. The rapidity with which steamboats move, and the secrecy of night travel on them, as well as other craft used on the streams, required that extraordinary means should be resorted to, in order to prevent, detect and punish where more than common opportunity was presented for the commission of crime, and escape from its punishment. To confine the operation of this section of the law to counties, through which such boat had already passed, would in many, if not most instances of crime thus committed, thwart the evident design of the enactment, by leaving the offending crew of a vessel a clear and open channel to run before the law. The officer of the law would be unable to exert his power until "the boat had left him." It certainly cannot be supposed that a special provision of this kind would be enacted for any other purpose than to extend the jurisdiction of the law, so as

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to secure the end of justice, by rendering such transient offenders amenable to the sure hand of the law.

But we think the language of the law, when fairly construed, settles this question. It expressly refers to "that trip or voyage," meaning any county through which the vessel may have passed whilst performing her "trip or voyage." The vessel on which the offence was committed, as the record shows, did pass on her "voyage" from Scott county, down the river Mississippi, to the county of Muscatine, where the offender, Nash, was arrested, tried and convicted. The whole proceeding was within the jurisdiction of the state of Iowa, and the boat having passed through a part of the county of Muscatine, within which the arrest was made, we think jurisdiction of the case was properly and legally exercised by the district court of that county, as far as this point is concerned.

The objection that the district court of Muscatine county was not legally in session when this cause was tried, and judgment given, is answered by the record. It appears that the indictment was regularly found by the grand jury at a regular and legal term of the court. It further appears, that the cause was twice continued, and the court as often adjourned, at the *particular request* of the prisoner, *and for his benefit*, by his agreement on file. It certainly is unnecessary to resort to argument to show that the court below was not in error here. The humane indulgence of the court in granting further time to the prisoner, who stood for trial in a capital case, when it was prayed for by the accused himself to enable him to procure the testimony of his witnesses in defence of his life, cannot be successfully pleaded as error, so as to affect the judgment in the case, by him. He cannot complain of error in a proceeding which was clearly beneficial to him, and which was had in answer to his own request.

It only remains for us to dispose of that assignment of error relative to the reading of the deposition on part of the prosecution. The dedimus to take the depositions was

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prayed for, granted and taken at the instance and on behalf of the prisoner and plaintiff in error here. And the depositions having been returned and opened, by leave of the court, after being properly filed as a part of the case, the court allowed the prosecuting attorney to read them on part of the prosecution. To this proceeding the counsel for the prisoner neither objected nor consented. This action of the court in the case is complained of here as illegal; and for it a reversal of the judgment is urged. For the protection of the rights of the accused, the provision and power of the constitution is invoked, and it is claimed in his behalf, that he had a right to "be confronted by his accusers and the witnesses of the state." It is most clearly the duty of the court to guard carefully the rights of a citizen when upon trial for high crime. It is bound to see that he has a full, fair, and impartial trial, under the constitution and the laws. Has he been, in this case, denied the benefit of this right? The testimony was of his own procurement. The witnesses were selected by himself, and he propounded the questions which were answered by them. At his instance, the depositions were returned and filed in the court, as part of the case for hearing, and in order to sustain his defence on the issue joined. The evidence, if relevant and material, was in the possession of the court, by his own act. It had not, in any way, been subject to the control of the prosecution, until after it was filed in the case, as the testimony of the prisoner, for his own benefit; when filed, it was in the custody of the court, as evidence in the case. We cannot see, under the circumstances, how moral wrong, or injustice in fact, could be done to the prisoner. Whether the depositions were read by the counsel for the state, or for the prisoner, could not materially affect the merits of the case. The bill of exceptions does not show that the prisoner, or counsel, offered any objection to the reading of them, by the attorney for the state, at the time; but merely took an exception to the ruling of the court in suffering them to be read. Nor does it appear that any intention

was shown, or attempt made by the prisoner or his counsel to withdraw the depositions from the files of the court or the trial of the cause. It is the mere act of reading them, by the counsel for the state, which is excepted to. Was the court legally justified in thus permitting the evidence of the prisoner to go to the jury? We think this ruling of the court is warranted by the act of the legislature "regulating criminal proceedings." Rev. Stat., 160, § 109, where it is enacted, that "the power and practice of the courts in criminal matters shall (except so far as herein modified) remain the same as they have heretofore been; and shall, as far as practicable, be made to coincide with the corresponding practice in civil cases." By turning to "An act regulating the mode of taking depositions, and to provide for the perpetuation of testimony" in civil proceedings, Rev. Stat., 228, § 9, we find that it is provided, that "all depositions taken in pursuance of this act, *when returned into court*, may be read by either party, on the trial of the cause to which they relate." Here the legislature again, we think, has given direction to the power and action of the court in relation to the practice in this very matter. We view the course adopted, and acted upon by the court, as in accordance with the practice prescribed by these acts taken in connection and fairly construed. This view of the questions contemplates this construction, and the legislative enactments on which it is put, as substantially free from constitutional objection, and working no wrong to the prisoner, by taking from him his legal rights; whilst the great designs of judicial trial, the ascertainment of truth, and advancement of justice, are attained by the court. The court below, by its proceedings in the case, as it appears of record, as well as the counsel for the prosecution, seems to have extended to the defendant every opportunity of making manifest his innocence, consistent with "the law of the land," administered with a careful regard for the public security and weal, as well as the rights of the accused. We see nothing in the errors assigned, which, viewed in the light of

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reason, justice, or law, will warrant us in interfering with the judgment of the district court.

Judgment affirmed.

S. Whicher, for the prisoner.

W. G. Woodward, for the state.



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A tax deed is not good which conveys more land than was assessed or advertised for the taxes.

If A covenants to make B a good and sufficient deed, B is not obliged to take the deed, unless A has a good and indefeasible estate in the land covenanted to be conveyed.

Dependent and independent covenants explained.

Plaintiff agreed to do work for defendant and take land in payment. Defendant contracted to make a good title to the land, on the performance of the work, but the title was not in him. Held that plaintiff was at liberty to rescind the contract and was not obliged to do the work, and that if he did the work, he was entitled to payment as on a cash contract to do work.

ERROR TO MUSCATINE DISTRICT COURT.

Opinion by KINNEY, J. Peter Casey filed a petition for a mechanic's lien, stating that on the 12th day of August, 1847, George W. Fitch being then alive and owner of the middle twenty feet of lot 6 in block 12 in the town of Bloomington, Iowa, entered into a contract with the petitioner and employed him to furnish labor for erecting a storehouse on said lot, which petitioner proceeded to do, and that before the completion of said contract, said Fitch deceased. That Harriet Fitch, the widow and administratrix of said George W. Fitch, contracted with and employed the petitioner to perform other and further work on said building towards the completion of the same. That such labor was furnished to the amount of

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\$162.37, as per bill of particulars filed and made part of the petition; payment of which became due when the same was performed, but has not been made. Petitioner further represents, that for that part of the labor contracted for by said George W. Fitch, payment was to be taken in the east half of lot number 8, in block 103, at \$50; or if said Casey should prefer to purchase twenty-four feet on the westerly side of lot 4, in block 74, at \$150, he was to have and receive the same.

Petitioner represents that he has preferred to purchase the said twenty-four feet in said lot 4, and has signified said preference to the said Harriet Fitch, but charges that said George W. Fitch had not, nor have his representatives, any good title in law to the said twenty-four feet by which they or any of them can convey the same to petitioner.

The petitioner prays for the benefit of an "act relative to mechanic's liens and for other purposes," and for a lien upon the premises aforesaid. To this petition the defendant filed a plea, stating in substance that the contract was entered into in the lifetime of said George W. Fitch, whereby it was discretionary with the said Casey to receive in payment of said work, either the east half of said lot number 8, in block number 103, at \$50, or to purchase twenty-four feet on the westerly side of lot 4, in block 74, at \$150. And the said defendants aver that after the work to be performed by said plaintiff under his contract with said Fitch was completed, the said plaintiff did choose and prefer to purchase twenty-four feet on the westerly side of lot 4, at \$150, which said parcel of lot the said George W. Fitch died seized, and to which he has a good and sufficient title. The defendants further aver, that it was in consideration that the said plaintiff would purchase said twenty-four feet, at the sum of \$150, that she, as administratrix, employed him to do the other and further work upon said build-

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ing; and that after said work was performed, she accounted with the plaintiff and paid him \$18.62 which was to be in full of all demands, when she should make to him a good and sufficient warrantee deed of conveyance to said part of lot 4. The defendants further say, that they are ready and willing at all times to convey to plaintiff said part of lot, and to perform specifically said contract, and that they are ready, upon the authority of the court in chancery sitting, to convey said part of lot in like manner as the said George W. Fitch could or ought to have done were he living. To this plea the plaintiff replied, that neither the said defendants, nor the said George W. Fitch in his lifetime, had a good title to said part of lot 4 in the plea mentioned, and this he prays may be inquired of by the county.

The cause was submitted to the court upon this issue of title, and testimony having been offered, it was adjudged by the court that the defendants had not sustained their plea, and the court finding for the plaintiff, rendered judgment in his favor for \$150 with a lien for the payment on the middle twenty feet of lot 6, with leave to sue out a special execution.

It appears from the bill of exceptions, that on the trial of this cause the court ruled that it was material to determine whether George W. Fitch, in his lifetime, was seized of and had title to the westerly two-fifths of lot 4, in block 74, in the town of Bloomington; and the said defendants produced a deed made in due form by the collector of taxes of Muscatine county, Iowa, to the said George W. Fitch deceased, for the next two-fifths of said lot, the said deed having been made in pursuance of a judgment of said court at the spring term thereof, 1847, against the said two-fifths of said lot for non-payment of the tax due thereon for the year 1844. It appeared that but the west one-fifth of said lot had been assessed for the year 1844; that on the delinquent list the collector returned the west two-fifths as delinquent; that the west one-third of said lot was advertised as required by law; and the ques-

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tion was whether these variances between the assessment, advertisement and judgment, would vitiate the title of the said George W. Fitch to the west one-fifth of said lot, which was all that was claimed by said Fitch under said deed. To prove title to the one-fifth of said lot next to the west one-fifth, the defendants offered a deed of general warrantee dated February 1, 1841, from Charles A. Worfield to George W. Fitch, acknowledged and recorded, conveying a part of said lot by the following description, to wit: "One fifth part of lot 4, in block 74, being twelve feet of said lot, the said lot being divided into five equal strips, and the numbering beginning on the east, the piece hereby intended to be conveyed is the fourth from the east side of said lot."

And the court decided that the said variances raised such a doubt of title in the said Fitch, that his contract with the said plaintiff, as set forth in the defendants' plea, could not be discharged by a good and sufficient deed of general warrantee to twenty-four feet on the westerly side of lot 4 in block 24; the size of said lot being admitted to be sixty feet front by one hundred and forty feet deep. To which ruling and opinion of the court the defendants excepted.

It will be recollected that, according to the pleadings, the plaintiff and defendants agree in relation to this main feature in the contract, that it was optional with Casey to receive in payment for his work either the east half of lot 8, or to purchase twenty-four feet on the westerly side of lot 4. Casey states in his petition that he elected to take the latter, but charges that the defendants cannot make a conveyance to said part of lot 4. The defendants admit that Casey elected to take part of lot 4 instead of the west half of lot 8, but aver a settlement and payment of \$18.62, which was in full of all demands when defendants should make the plaintiff a good and sufficient warrantee deed of conveyance to said part of lot 4.

The defendants, therefore, in their plea admit the con-

tract, admit the right of plaintiff to choose which piece of ground he would take in payment, admit the selection of part of lot 4, and admit that they were to make to plaintiff a good and sufficient warrantee deed of conveyance to said part of lot, and aver that they have a good title to said lot, and that they are willing to make the conveyance.

The case being thus narrowed down by the state of the pleadings, it is unnecessary to discuss those questions raised in the argument as to the rights and duties of parties when contracts are in the alternative.

The pleadings and evidence raise but two questions. First, Does the testimony show that the deceased in his lifetime was seized of a good title to said part of lot 4, and could the defendants as his representatives be empowered to convey the fee in said lot to the plaintiff?

Second, Would it have been a sufficient discharge of the contract for the defendants with a defective title to have made a deed good in form; and would the plaintiff have been obliged to accept such deed when, by the admission of the defendants, they were to make a good and sufficient warrantee deed of conveyance?

First, As to the nature of the defendants' title and their power to make a deed. The entire lot is sixty feet front, and one hundred and forty feet deep. The plaintiff was to have twenty-four feet on the westerly side. The defendants had a tax collector's deed for the west two-fifths of said lot, but it appeared that but the west one-fifth was assessed, although the collector had returned the west two-fifths as delinquent. The west one-third was advertised as required by law, and the west two-fifths sold. Under this sale and by virtue of the collector's deed, the defendants claim a valid and subsisting title to the west one-fifth of said lot, the title to the other one-fifth next thereto being indisputable. These variances we think sufficient to vitiate the entire sale and defeat the collector's deed. In the assessment of property for taxes, and from thence

through each progressive step up to the sale and deed, the officers should be held to a strict and technical compliance with the requirements of the statute.

The doctrine of presumptions cannot apply in relief of their mistakes, or to avoid the effect of their omissions. All of the proceedings must be in conformity with the statute, and they may be introduced in evidence to show a want of such conformity and to defeat a collector's deed, which is but *prima facie* evidence that the statute has been complied with. The deed as evidence of title is subject to all the legal objections which may exist, to every material step in the proceedings antecedent to its execution and delivery. If no such objections exist, it conveys a good title; if they do exist, no title passes. In this case, these objections are of a serious character, and the evidence shows a manifest violation of some of the most important provisions of the statute. Two-fifths of the lot were sold and a deed made, when but one-fifth was assessed for taxes. The officer sold one-fifth, on which no tax was levied, and therefore on it no tax incumbrance existed. The west one-third only was advertised, and yet the west two-fifths were sold. A portion of the lot was sold without the previous notice required by the statute having been given. These discrepancies and omissions are fatal to the validity of the sale, and hence no title passed to the purchaser. The representative consequently could not make a good and sufficient deed of conveyance to one-fifth of the lot in controversy, and as the defendants had no title, it would be impossible in a suit for specific performance to compel a conveyance.

We come now to the second proposition. Although the defendants had not a good title to all of the part of said lot, would a deed, good in form, purporting to convey a fee-simple, satisfy the contract, leaving the plaintiff to resort to the covenants in the event of a failure of title?

If A covenants to make B a good and sufficient deed to a piece of land, B is not obliged to take such deed unless A has a good and indefeasible estate in the land

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covenanted to be conveyed. The contract cannot be discharged by a tender of a deed in the usual form, purporting to alien the fee, unless the title is perfect in A, and the land free from all incumbrances. *Clark v. Redman*, 1 Blackf., 379; *Judson v. Wass*, 11 John, 525; *Tucker v. Woods*, 12 *ib.*, 190; *Rubb v. Montgomery*, 20 *ib.*, 15; *Lawrence v. Parker*, 1 Mass., 190.

In the case of *Judson v. Wass*, it was held that as giving the deed, bond and mortgage, were to be simultaneous acts, that as the plaintiff was not in a situation to convey a title, the defendant was not bound to perform the agreement on his part; that the meaning of the agreement was not merely that the plaintiff should give a deed with warranty, but that he was able to convey an indefeasible title, and that if the vendee had, according to the terms of the sale, paid part of the consideration money, and the vendor was unable to convey a good title, the vendee might disaffirm the contract, and recover back the money which he had paid. And in the case of *Jackson v. Hasbrouck*, it was held that as the proof showed that the property to be conveyed by the plaintiff to the defendant was under lease which would not expire until long after the bargain between the parties was to have been consummated, that it came clearly within the principles decided in the case of *Judson v. Wass*. But these and similar decisions, it will be found on examination, were made in those cases where the acts to be performed by the parties were simultaneous; or in other words, where the promises were dependent.

Therefore, when the covenants are dependent, the conveyance of the land and the payment of the money must be simultaneous, and there must be an existing capacity to convey at the time in the person who is to execute the conveyance; but where the covenants are *independent*, and the payment of the money is to precede the conveyance, it is no excuse for the non-payment of it that the other party has not a pre-existing capacity to convey a good title, unless the party whose duty it is to pay the

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money offers to do so on receiving a good title, and then the other party must give him a good title, or the contract will be rescinded. *Robb v. Montgomery*, above referred to; *Champion v. White*, 5 Cow., 509; *Green v. Green*, 9 Cow., 46; see also on the subject *Caswell v. Manufacturing Co.*, 14 John, 453.

In the case under consideration, if the contract had been that the defendant was to have made a good and sufficient title to the plaintiff to the part of said lot, upon the payment by said plaintiff of \$150, the payment and conveyance would have been simultaneous acts, or mutual and dependent, and the plaintiff would not have been compelled to pay the money unless the defendants could have made, at the time of payment, a good and indefeasible title; and in the event of payment, unless such title could have been made, the plaintiff could have rescinded the contract, and recovered back the money so paid. So if payment was to have been made in work for a piece of land for which the defendants had no title, (which fact being unknown to the plaintiff,) and the defendants had contracted to make a good title on the performance of the work, the plaintiff would be at liberty to rescind the contract, and not obliged to do the work; and in the event of having performed the work, he would be as much entitled to recover the value thereof as he would have been to recover back the amount paid on a money contract. If the plaintiff had become satisfied before doing the work that Fitch had not a good title to said part of said lot, he could have disaffirmed the contract; and in a suit against him upon the contract, it would have been a good defence to have shown a want of capacity in Fitch to convey. The plaintiff has not surrendered any of his rights by performing on his part the contract.

As the plaintiff was under no legal obligation to perform the work, neither is he required to receive in satisfaction thereof a defective title. That which in the first place was not a sufficient consideration to hold Casey to

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an observance of the contract, certainly should not be regarded as a sufficient payment after the contract is performed. If there was any evidence that Casey was to receive *only* such a title as Fitch possessed, an entirely different case would be presented. But the defendants admit plaintiff's right to a good and sufficient warrantee deed. Such a deed is not only one good in form, with the usual covenants, but one which conveys a clear indefeasible title, and anything less than this is not a good and sufficient warrantee deed; and when parties contract for such a deed, it must not only contain all the necessary covenants, but the grantor must possess full capacity to make it. We have shown that the title in the defendant to a portion of the lot was not good, and hence such a deed as the plaintiff was entitled to could not be made by the defendants. The contract was mutual and dependent, Casey to do the work and defendants to make the deed, and therefore in such case, according to the decisions, Casey is not bound to accept of a defective title, but may sue and recover for his work and labour, which he did in the court below.

Judgment affirmed.

J. Scott Richman, for plaintiffs in error.

Wm. G. Woodward, for defendant.



THE STATE v. CHAMBERS.

Under the statute, the word "larceny" designates grand larceny, as distinguished from petit larceny.

An indictment upon a statute should state, substantially, if not in the very language of the law, all the circumstances which constitute the definition of the offence in the act.

An indictment is good which follows the words of the statute on which it is founded.

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The section of the statute in relation to petit larceny regulates that offence without reference to the preceding sections.

The word "steal" has a uniform signification, and means felonious taking and carrying away the personal goods of another.

ERROR TO LINN DISTRICT COURT.

Opinion by GREENE, J. An indictment was found against the defendant, and on motion quashed, on the ground that no indictable offence is charged therein.

The indictment contains two counts, and is commenced in the usual form, and charges that William H. Chambers, at the time and place specified, "one box of percussion caps of the value of 25 cents, of the personal property of one Joshua Glover, then and there being found, did steal, contrary to the form of the statute in such case made and provided," &c. In the second count, Alexander Glover is named as the person from whom the percussion caps were stolen, and differs from the first count only in that one particular.

The only question involved in the case is, Did the court err in quashing the indictment?

The objection taken to the indictment is, that the charge is too general, and does not set forth all the ingredients of the offence, upon which proof should be required.

The offence of larceny and petit larceny is defined by statute. Rev. Stat., 173, § § 40, 41. These sections describe the offence of larceny; and § 42 declares that if the property stolen is "of the value of \$25 and upwards, it should be deemed larceny." The forty-third section regulates the measure of value upon certain articles stolen, and § 44 provides, that "every person duly convicted of *larceny* shall be imprisoned in the penitentiary," &c. By these sections, it is clear that the legislature recognized and applied the term "*larceny*" as meaning grand larceny in contradistinction to petit larceny. To that sense the application of those sections appears to be exclusively confined. Had the indictment in this case been for larceny as limited by statute, instead of petit larceny, it should

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have pursued substantially that language of the statute which is descriptive of the offence. It is well settled that an indictment upon a statute must state substantially, at least, if not in the very language of the law, all the circumstances which constitute the definition of the offence, as defined in the act.

But the indictment in this case is founded upon the forty-fifth section of the act referred to, which provides that, "if any person shall steal from any other person or persons, or from any dwelling-house, or from any water-craft or other place whatsoever, any moneys, goods, wares or merchandize, or other personal property or thing whatsoever, of a less value than \$25, every person so offending shall be deemed guilty of a petit larceny, and upon conviction thereof, shall restore to the owner or owners the thing or things so stolen, and be fined in any amount not exceeding five times the amount of the value thereof, and be imprisoned in the jail of the county not exceeding thirty days, and until the fine and costs are paid, if the same shall be paid within twenty days from the expiration of said imprisonment." This section of itself, it will be seen, completely regulates the offence of petit larceny, without any reference to the preceding sections, either by language or implication. The rule of adjudging the value of stolen bank notes, bonds, bills, and the like, as prescribed in § 43, may properly be recognized as alike applicable to cases of larceny and petit larceny. But §§ 40, 41, 42, and 44, above referred to, we regard as exclusively pertaining to the offence of larceny, as therein defined. Thus viewing the application of these sections, it only remains for us to test the indictment in this case, under the specifications of § 45, which determines the offence of petit larceny.

It is now a prevailing rule, that an indictment is good which follows the words of the statute upon which it is framed. And many of the authorities go so far as to hold that it is sufficient if the words used in an indictment are equivalent to those of the statute, or of the same substance to a reasonable intendment. *State v. Bougher*, 3 Blackf.,

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307; *U. States v. Wilson*, 1 Bald., 78; *United States v. Lancaster*, 2 McLean, 431; *State v. Duncan*, 9 Porter, 260; *State v. Helm*, 6 Miss., 263; *Chambers v. The People*, 4 Scam., 351; *The State v. Noel*, 5 Blackf., 548.

The present indictment conforms to the rule recognized in the foregoing cases; it describes the offence in the very language of the statute, and hence we can but regard it as sufficient.

We think the indictable offence clearly and specifically charged; its character cannot be mistaken, nor the defendant misled in the crime preferred against him. The word "*steal*" has a uniform signification, and in common as well as in legal parlance, means the felonious taking and carrying away of the personal goods of another.

Judgment reversed.

William Smyth, for the state.

I. M. Preston, for defendant in error.



PARKER v. LEWIS.

P., in speaking of **L.**, said, "He is a thief, he stole my wheat and ground it and sold the flour to the Indians;" held that these words are *per se* actionable in slander.

Words actionable in slander by implication of law are to be considered as false and malicious, unless the contrary is made to appear by the evidence. In slander, when the words spoken are actionable *per se*, special damages need not be alleged or proved.

ERROR TO BENTON DISTRICT COURT.

Opinion by WILLIAMS, C. J. The plaintiff Lewis commenced his action on the case for slander, against the de-

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defendant Parker, at September term, 1848, of the district court of Benton county. The declaration is in the usual form, and charges that the defendant "falsely and maliciously spoke and published, of and concerning the plaintiff, defamatory words charging him with the crime of larceny." The plea of the defendant is, Not guilty. The jury rendered a verdict for the plaintiff for the sum of \$300. Defendant's counsel moved to set aside the verdict, and for a new trial, for the reasons: 1. That the verdict is contrary to the evidence and charge of the court, and should have been for the defendant. 2. Because the damages are excessive.

This motion was overruled. To this ruling defendant, by his counsel, excepted. The error assigned is, "that the court below erred in overruling the motion of defendant for a new trial, and in entering judgment on the verdict of the jury."

The testimony of all the witnesses in the case is set forth in the bill of exceptions. The allegations of the declaration, as contained in the several counts, are substantially sustained and established by proof. The evidence shows that the plaintiff Lewis owned a mill; that he carried on the business of a miller in Benton county; that the defendant Parker had taken wheat to the plaintiff's mill to be ground into flour; that a part of the wheat had been ground and tolled, according to the custom of the mill; that a part remained to be ground, when a company of Indians came to the mill to procure flour; that Lewis the plaintiff left off grinding the wheat of Parker, for the purpose of supplying the wants of the Indians. In this state of things, Parker arrived at the mill, to receive the proceeds of the wheat. Finding that only a part of his wheat had been ground, he was displeased, and expressed his dissatisfaction in harsh terms; and among other expressions he charged Lewis with stealing his wheat to supply the Indians with flour. He at once demanded, and received the flour which had been made and tolled, together with the residue of the unground wheat,

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and departed. Several witnesses proved that Parker, at different times and places afterwards in Benton county, had said and published that "old Lewis was a thief, and had stolen his wheat, and ground it, and sold it to the Indians." To some of the witnesses he stated that "he had employed a lawyer to prosecute Lewis for it."

It appeared that a part of the testimony was of words, spoken more than one year before the commencement of the action. This, on motion of defendant's counsel, was ruled out by the court, and the jury instructed not to consider it in making up their verdict.

It was contended by defendant's counsel, on the trial below, and in this court, that the words proven only involved a charge of fraud or misconduct on the part of Lewis, in his business of a miller; which might be sufficient to maintain an action for special damages, as affecting him injuriously in his business of milling. That the words spoken could not be construed legally so as to import a charge of larceny. We think differently. The words, as laid and proved, are actionable in themselves. They distinctly charge upon the plaintiff the crime of larceny; and the defendant's intention to prosecute him for it. The witnesses all testify of the words, as spoken by the defendant, without any explanatory or qualifying statements of the transaction upon which he founded the charge, which would tend to prevent those to whom he addressed himself from coming to the conclusion that he accused Lewis of being guilty of larceny. The fact that the plaintiff was a miller at the time, and that the wheat was alleged to have been stolen by him, at his mill, for the purpose charged, does not necessarily in law preclude the possibility of a commission of the crime of larceny. The wheat might have been taken by the defendant to the plaintiff's mill, and before delivered into his possession as miller, have been stolen from the possession of defendant. But cases may and do occur, in which persons, by falsehood and fraud, acquire possession of property, with the consent of the owner, who is ignorant of that

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intent. In such case, if the evidence establishes satisfactorily that the felonious intent existed in the mind of the person, and that he only resorted to the means of acquiring possession of the property to carry that design into execution, by appropriating it to his own use, he would be legally chargeable with the crime of larceny. Such "taking and carrying away the personal goods of another" is as much larceny as that where the possession is acquired without the knowledge and consent of the owner. The *quo animo* is the gist of the offence. That must be established clearly. This done, it is enough in law. If it were otherwise, the cunning and learned in thieftcraft would leave those of their fraternity who might be less adroit than themselves to suffer the ignominious punishment of larceny, whilst they, no less guilty, would be merely put to the exercise of their peculiar tact in business, to litigate with the persons whose rights they had assailed in a civil proceeding at law. The charge of larceny, as proved, is general in its term. It is made so as to stamp the character of the plaintiff as that of a thief in the community.

The words spoken being actionable, by implication of law, they are to be considered as false and malicious, unless the contrary is made to appear by the evidence. No such evidence was adduced. *Byrket v. Morohon*, 7 Blackf., 82; *Yeates v. Reed*, 4 *ib.*, 463; *Roberts v. Camden*, 9 East., 93.

It often occurs that they who design to slander avoid direct and affirmative charges of crime, or pretend to make some qualification of the words spoken, so as to perpetrate the injury, and at the same time escape the legal consequence. This, however, will not avail, if the words are calculated, as spoken, to induce the hearers to suspect that the plaintiff is guilty of the crime. In such case an action will be maintained. Starkie on Slander, 58; *Drummond v. Leslie*, 5 Blackf., 453. It has also been decided, that "words not actionable in themselves, may express a criminal charge, by reason of their allusion to some extrinsic fact, or in consequence of being used and understood in a

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particular sense, different from their natural meaning, and thus become actionable." *Hays & wife v. Mitchell & wife*, 7 Blackf., 117. This accords with the spirit of the law, which, when duly enforced, is designed to establish the right, and afford adequate redress for the wrong.

In cases like this, the defendant, to avail himself of the defence here attempted, should be able to show, on proof, that explanatory words were used, or that the subject matter in allusion to which the words were spoken, was clearly such as to show they were not actionable. *Bac. Abr. Title, Slander R; Beckett v. Sterrett*, 4 Blackf., 501. In this last cited case the parties were partners in the business of merchandizing. When settling up the concern, Beckett said to Sterrett, "You pilfered money out of the store." The judge who delivered the opinion of the court says, "There were no words referring to partnership money in the custody of the plaintiff, nor that the money of the partnership was the subject matter in reference to which the words were spoken, and being unexplained by the speaker, we will not search for reasons to rebut the presumption that he intended to charge the plaintiff with a felony. In cases like this, where by the defence the question is raised as to the words, whether they impute a felony, it is proper for the jury to decide it."

It was also contended by the counsel for defendant, that in this case the plaintiff should have been held to the allegation and proof of special damages. We have decided that the words as laid, and proved to have been spoken, are actionable. Where such is the case, special damages need not be alleged, or proved.

We think that the damages are not excessive. We find no error in the refusal of the district court to set aside the verdict and grant a new trial.

Judgment affirmed.

J. P. Cook and Wm. Smyth, for plaintiff.

I. M. Preston, for defendant.

Mears v. Garretson.

MEARS v. GARRETSON.

Where a party sues out a writ of error *coram nobis*, but does not give the notice as required by statute, the judgment may be affirmed.

Errors will not be favorably regarded which are based upon the negligence of the party assigning them.

Where a party filed a motion in the district court, to affirm, for want of notice, but before the motion was decided filed a demurrer, it will not be considered an appearance or waiver of notice.

ERROR TO LINN DISTRICT COURT.

Opinion by KINNEY, J. In this case judgment was rendered in the district court of Linn county, against the plaintiff in error, upon which he sued out a writ of error *coram nobis*.

In the district court a motion was made to dismiss the writ and affirm the judgment, for the reason that no notice had been given to the adverse party of suing out the same. This motion was sustained by the court, and the judgment affirmed with ten per cent. damages.

This decision of the district court is assigned for error.

The statute allowing the writ of error *coram nobis*, provides that the party suing out such a writ shall cause notice in writing to be served upon the adverse party or his attorney ten days before the next succeeding term of the court, and if ten days shall have elapsed from the time of serving such notice and the first day of said term, the court shall proceed to try and determine said cause, whether the defendant appear or not. If ten days do not intervene, the cause shall be continued, &c. Laws of 1846, p. 51, § 3.

The question presented in this case, is one arising upon a construction of this statute. It is insisted by the attorney for the defendant in error, that the court, by virtue of its power under the statute, (to adopt such rules as were necessary to govern proceedings of this kind,) had a right under those rules to affirm the judgment when the notice required had not been given. The statute does not appear

to contemplate an entire absence of notice, and consequently there is not any provision made for a proceeding where notice has not been given, and we are led to inquire whether by legal intendment the court properly exercised a power which is not expressly conferred by statute. The legislature authorized the issuing of this writ for the purpose of correcting errors in fact, and defined the powers and duties of the court while sitting as a court upon its own alleged errors. The statute provides for the hearing and determining of the cause upon notice given, but we cannot think that it ever was the intention of the legislature that, upon default of the party to give notice, the court would have less power to render judgment than if notice had been given. If this were the case, the party in default could take advantage of his own laches, and as the power to affirm would depend upon giving notice, a party wishing to avoid the collection of a judgment might sue out his writ, fail to give the notice, avoid the affirmation of the judgment, and in this manner escape the collection of judgments in the district court. But it may be said that the writ would be dismissed for the want of notice. This would not remedy the evil, as the party being then restored to his original position, could sue out a second writ of error, and as a penalty in damages could only follow an *affirmance* of the judgment, it is not improbable that a statute which is only remedial in its character might be made an engine of oppression. Although the statute does not expressly authorize the court to render judgment, in case notice has not been given, yet we are not disposed by a forced and unnatural adherence to the letter of the statute, to give it an effect so subversive of justice and the rights of judgment creditors. It is a well settled practice to give remedial statutes a liberal construction, and we are not inclined to depart from that rule, particularly in cases where injustice would be the result of such departure.

Courts are not disposed to regard very favorably errors which are based upon the negligence of the party assign-

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ing them, whereby he seeks to reverse a judgment upon the ground that he was in default. In this case the party virtually says, upon the motion to affirm for the want of notice, that if he had given the notice required of him by statute, the court would have had power to affirm the judgment, but as he failed to do that, the court cannot affirm, and the action of the court predicated upon the fact that the party did not give notice, is assigned in this court for error by the party in default. We think upon this assignment that the court did not err.

The second error alleged is, that the defendant in error filed a demurrer, and therefore there was an appearance; and he could not object to the proceeding for the want of notice. From the record it appears that the first step taken by the defendant below was to file a motion to affirm. Before that motion was disposed of, he filed a demurrer. The object of filing the demurrer undoubtedly was to be prepared in the event of the motion being decided against him, and as that motion appears to have been the one relied upon, and as it was entitled to and received precedence, we cannot think his rights under the motion were waived or prejudiced by his filing a demurrer.

As we see no error in the ruling of the court, the judgment is therefore affirmed.

Judgment affirmed.

N. W. Isbell and Wm. Smyth, for plaintiff in error.

I. M. Preston, for defendant.

BROWN v. HOLLENBECK.

It is error to render a judgment by default if a plea is on file in the case. After a plea is filed the issue should be tried.

ERROR TO LINN DISTRICT COURT.

Opinion by GREENE, J. In the court below judgment was rendered against Brown by default. But it appears that on the day previous, and within the time required by rules of court, a plea had been filed.

The practice is too well settled to admit of doubt, that judgment by default cannot be entered if a plea in bar is on file in the case. *Davis v. Brady*, Morris, 101; *Elliott v. Leak*, 4 Mis., 540; *Conell v. Marks*, 1 Scam., 391; *Manlow v. Beuner*, *ib.*; *Harris v. Maskingum Man. Co.*, 4 Blackf., 267; *Maddox v. Pulliam*, 5 Blackf., 205.

The decisions are uniformly to the effect, that after a plea is filed in a case, the issue should be tried by a jury, even if the defendant does not answer on being called.

As counsel, in order to delay the collection of a debt, by securing a reversal of the judgment, may file their plea in a silent manner without notice to the opposing counsel or the court, and then withdraw or otherwise intimate that they have no defence, the district judges should invariably inquire whether there is a plea on file before suffering a judgment by default to be entered.

In this case the plaintiff below appears by the record to have had a just claim against the defendant, but still the judgment must be reversed, rather than depart from a salutary and well settled rule of practice.

Judgment reversed.

N. W. Isbell, for plaintiff in error.

I. M. Preston, for defendant.

CHAMBERS v. GAMES.

In an action of debt on a note under seal, the plea of *non est factum* is admissible; but, as it puts in issue the execution of the note, it should, under the statute, be verified by affidavit.

Evidence of fraud, covin, or illegality of consideration, is not allowable as defence under the plea of *non est factum*.

It is not sufficient notice of special matter in defence of an action under the statute, to state "that the note had been given for a claim of public land, belonging to the government of the United States, on which there was no improvement; or that there was no consideration for the note; or that the consideration had wholly failed." The notice should specially point the particular matter relied upon in defence of the action.

Proof of a set-off may be excluded unless defendant has filed with his plea the particular items of his demand.

An item in an account, designated as a "cash balance on settlement, \$50," is sufficiently specific.

ERROR TO LINN DISTRICT COURT.

Opinion by WILLIAMS, C. J. George W. Games instituted his action of debt on a sealed instrument for \$150, and laid his damages at \$50, &c. The note bears date November 11, 1836, payable on or before the 1st day of May thereafter, with a credit of \$15.62½ indorsed thereon. To the declaration of the plaintiff, the defendant filed his plea of *nil debit* with notice, &c., to which the plaintiff demurred. The demurrer was sustained. The defendant was allowed to plead over. He then filed his plea of *non est factum*, together with the notice "that the defendant will offer in evidence, and prove on the trial of the above cause, that said note upon which the above suit is brought was given by the said defendant to the said plaintiff for a claim of public land belonging to the government of the United States; and that there was no improvement on said claim." 2. "That there was no consideration for the giving up of the said note." 3. "That the consideration for the giving of said note has wholly failed." And the said plaintiff will also take notice that

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the said defendant will, on the trial of the above cause, offer and prove the following items of set-off against the demand of the said plaintiff, viz :

GEORGE W. GAMES,

To James Chambers,

Dr.

1837.

To one lot of cloth, commonly called Kentucky

Jeans, of the value of	\$20
„ One claim	50
„ Fence, rails, and breaking prairie	50
„ Work and labor	12
„ Cash balance on settlement	50

The issue being joined, the cause was tried by a jury, and a verdict rendered for the plaintiff, for \$61.9, and judgment thereon entered.

It appears that, on the trial, the plaintiff having read the note in evidence to the jury, rested. The defendant then offered to prove that the note was given for a claim on the public land of the United States, upon which there was then no improvement. Objection to this evidence, under the first and third notice, was made by the plaintiff, for the reason that these notices were too indefinite. The objection was sustained by the court, to which ruling defendant excepted. The defendant then offered the same evidence under the second notice, to which plaintiff objected, for the reason that the notice was of *want* of consideration, and the matter offered was of *failure* of consideration. The objection was overruled, and the witness allowed to testify. The evidence being heard, was ruled out as inadmissible, on the second point of notice.

The defendant then proceeded to give evidence under the notice of set-off. On motion by plaintiff's counsel, this was also excluded, on the ground that the notice was insufficient as to the specification of the matter of set-off. Defendant excepts to this ruling of the court, as follows:

1. The court erred in refusing to admit the evidence offered by the defendant below.

2. By ruling from the jury the evidence given by the witness William Chambers, as contained in the bill of exceptions.

3. By refusing to allow evidence of set-off, as offered by defendant below.

4. By sustaining the motion of the plaintiff below, to reject the notice attached to the plea of defendant below.

The plea of *non est factum* puts in issue the execution of the note, and is properly pleadable in this action, being a specialty, and constituting the foundation of the suit. However, to render it effectual in putting the plaintiff to the proof of the execution of the note, it was necessary that the defendant should verify the plea by his oath. This is required by the statute. Rev. Stat., 471, § 12, provides, "But no person shall be permitted to deny on trial the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be set up by way of defence or set-off, unless the person so denying the same shall file his or her affidavit, denying the execution of such instrument." In this case the plea was filed without the affidavit. We will not discuss the validity of the plea, as pleaded, there having been no motion made to set it aside, and as it was treated as the general issue by the parties, under which the defendant gave notice of the matter on which he intended to rely for defence on the trial. By going to trial on it the plaintiff accepted it. *Myer v. McLean*, 1 John., 509. We will add here, that at common law such facts only can be given in evidence, under the plea of *non est factum*, as will go to show that the defendant did not execute the writing obligatory; such defence as relates to the consideration or inducements which influenced the obligor to make it cannot be made under it. If fraud, covin, false representation, illegality of consideration, or the like matters which assail the contract itself, apart from the execution of the instrument, constitute the defence, they should be pleaded specially; or when provided for by statute, as therein prescribed, such defence is not allow-

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able under a general plea of *non est factum*. Any fact which will go to show that the defendant never, in the eye of the law, executed the writing obligatory, may be given in evidence under this plea. *Hughes v. Williams*, 3 Blackf., 170; *Vrooman v. Phelps*, 2 John., 177; *Dorr v. Munsell*, 13 John., 439; *Dale v. Rosevelt*, 9 Cow., 307. The ruling of the district court, in rejecting the evidence offered by the defendant under the plea of *non est factum*, was correct. There is none of it which relates to the execution of the instrument, but to the consideration of the contract only.

We will now proceed to the question arising upon the matter of notice, on which the defendant relied for defence to the action.

After pleading *non est factum*, the defendant, instead of pleading specially, availed himself of the statutory provision, which is as follows: "The defendant may, in his defence, plead specially, or may plead the general issue, and give notice in writing under the same, of the special matters intended to be relied on for a defence on the trial, under which notice, if adjudged by the court to be sufficiently clear and explicit, the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded, and issue taken thereon." Rev. Stat., 470, § 12. This enactment provides for, and allows a departure from, the common law practice of pleading, and must be substantially complied with. We have already shown, by the rules of common law pleading, the evidence of Chambers, as it relates altogether to the consideration of the contract, and not to the execution of the instrument, was properly ruled out, as inadmissible under the general plea of *non est factum*. We will now examine and see whether it should have been admitted under the notices. The defendant was under the necessity of pleading specially as at common law; or, it was his privilege to avail himself of the statutory provision, and give notice in writing of the special matter intended to be relied on for a defence on the trial. He chose to avail himself

of the latter. Is the notice such as is contemplated by the statute? We think not. It is too general in its character. The statute requires "notice in writing *of the special matters*," &c. The simple statement, "that the note had been given for a claim of public land belonging to the government of the United States, on which there was no improvement, that there was no consideration for said note, that the consideration for said note had wholly failed," gave to the plaintiff no information of the *special matter*, the facts intended to be relied on for a defence on the trial. It is not every contract for the sale of a claim of the public land of the United States, on which there is no improvement, that is necessarily void for want of consideration, fraud, &c. It is one thing to inform the plaintiff that the pleas of no consideration and failure of consideration will be pleaded as a defence to the action, and quite another thing to give him notice of the special matter that will be relied on. In permitting a party to an action to lay aside the common law form of pleading, and to choose a more simple and convenient mode of presenting his case, the legislature certainly did not intend to dispense with the substance. The object of the plea is to apprise the plaintiff of the matter of defence to his action, in order that in answer to his declaration, a proper issue may be formed for trial upon the law and facts involved. The material facts, the special matter constituting the plea, should be set forth in the notice, so as to inform the plaintiff of the substance of the defence, that he may have an opportunity to meet them, and if he can, to contradict them. This was the manifest intention of the legislature, and justice and reason dictate its propriety. The notice given in this case, as to the consideration of the writing obligatory, is general, not special of the matter relied on for a defence to the action. The court therefore ruled correctly as to this point in relation to the consideration. *Brazee et al. v. Blake et al.*, 5 Ohio, 211; *Reynolds et al. v. Rogers. ib.*, 104; *Shepard v. Merrill*, 13 John., 475; *Black v. Harrington*, 4 Vt., 69.

The next and last question is as to the notice of set-off and bill of particulars therewith filed for allowance against the demand of the plaintiff.

The statute provides, "that the defendant or defendants in any action brought upon any contract or agreement, either express or implied, having claims or demands against the plaintiff in such actions, may plead the same or give notice thereof under the general issue, as is provided in the twelfth section of this act, and the same or such part thereof as the defendant shall prove on trial shall be *set-off* and allowed against the plaintiff's demand, and a verdict shall be given for the balance due." Rev. Stat., 472, § 17. By this section the defendant is permitted to set-off any demands which he may have against the plaintiff. The tenth section provides, that "it shall be the duty of the defendant or defendants in all cases where he, she, or they intend to prove on trial any accounts or demands against the plaintiff or plaintiffs, to file with his plea a bill of the particular items of such accounts or demands, and no other accounts or demands shall be suffered to be proved to the jury or court on the trial." Rev. Stat., 470.

Here are express provisions providing for demands of the defendant, and the manner in which they shall be set-off against those of the plaintiff. If presented under a notice, as in this case, it is to be done as is required, in relation to the special matter, as provided for in the twelfth section above cited. This, as we have already decided on the other points, is, that the notice must be one in fact, setting forth the material points upon which the plea rests, and not merely the sum or conclusion of facts as determined by the person pleading. So the defendant, intending to prove any accounts or demands against the plaintiff, must file with his plea a bill of the particular items of such account or demands, or he will not be allowed to prove them to the court and jury. The intention of the legislature is so clearly expressed here that it cannot be misapprehended. The particular items of the account or demand must be given in number and character, with

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the date as well as the sum, so that the plaintiff may have an opportunity of testing their truthfulness. The defendant in this case filed his set-off, accompanied by a bill of particulars, a considerable portion of which was objectionable, it is true; but we think the court should have allowed the defendant to give proof to the jury of the last item, being cash balance on settlement \$50. This, we think, as a particular item, is sufficiently specific to apprise the plaintiff of all that would be necessary to enable him to test its validity before the court and jury on the trial. Indeed if a settlement (as this purports to have a date subsequent to that of the note sued) had been made by the parties, and thereupon a balance has been found due to the defendant, evidence of these facts, if it had been suffered to go to the jury, might have established a defence to the demand of the plaintiff. There is therefore error in this ruling of the court.

We have examined and decided the question presented in the argument of this case more at length than we should have done, had we not considered it important to settle the practice as to the matters involved.

Judgment affirmed.

N. W. Isbell and *I. M. Preston*, for plaintiff in error.

W. G. Woodward and *Wm. Smyth*, for defendant.

VIELE v. OGILVIE & CO.

A mere indorsement of a payment on a note is not *prima facie* evidence of payment, nor is it evidence of a new promise to revive a note barred by the statute of limitations, or discharged by a decree in bankruptcy, unless it is shown that the indorsement was made by the defendant, or by his consent, or that he actually paid the amount indorsed.

ERROR TO MUSCATINE DISTRICT COURT.

Opinion by GREENE, J. An action of assumpsit by Ogilvie & Co. against Viele, on a promissory note dated

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September 19, 1842. The note is for the payment of \$78.35, with interest at 10 per cent. per annum, and contains an indorsement of seventy-one and forty-three sixtieth bushels wheat at 50 cents per bushel, amounting to \$35.86, which indorsement purports to have been made October 13, 1843.

Plea, general issue and notice of a certificate in bankruptcy in discharge of indebtedness, averring the decree to have been made on the 3d day of April, 1843. By consent of parties a jury was waived and the cause submitted to the court, which found for the plaintiffs below, and rendered a judgment in their favor for \$74.9. Thereupon a motion was made by the defendant for a new trial, on the ground that the court rendered judgment under the mistaken apprehension that the discharge in bankruptcy took place before the note was given, which resulted from the mistake of a figure in one part of the record. This mistake was clearly shown by other portions of the record, and appears to have been conceded by the court, but the motion for a new trial was overruled on the ground that there had been a promise to pay the note since the defendant's discharge under the bankrupt law. We learn from the bill of exceptions that the only evidence before the court tending to show such subsequent promise was the indorsement of payment to which we have referred.

Though there are three errors assigned in this case, there is properly but one question involved. Is a naked indorsement of payment on a note *prima facie* evidence of such payment, and sufficient to establish a new promise and renewal of a note? If not, the court below did not exercise a sound legal discretion in overruling the application for a new trial. We consider it a well settled and salutary rule that a plaintiff cannot take advantage of an indorsement of a payment on a note as evidence of a new promise to revive a note barred by the statute of limitations or discharged by a decree in bankruptcy, unless he shows such indorsement to have been made by the defendant, or by his consent, or else by proof of payment of

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the amount indorsed. A mere naked indorsement, without some such evidence of its correctness, is not sufficient. See *Concklin v. Pearson*, 1 Richn., S. C., 391; *McGehee v. Greer*, 7 Port., 537. *Stut v. Mathews*, 7 Yerg., 313. In *Waterman v. Burbank*, 8 Metcalf, 352, the plaintiff gave in evidence an indorsement of payment written by himself, and dated within six years next before the suit was commenced, as follows: "Received Cotton Mill order, in part, \$16;" also an order of the same date drawn on the plaintiff in favor of the defendant by a third person for \$22.38, and directing the plaintiff to charge the same to the Cotton Mill; also an acknowledgment of the defendant written on the back of the order that he had "received the within as specified." It was held to be not a sufficient proof of payment.

We think that at least as much certainty of proof should be required to revive a debt barred by a proceeding in bankruptcy as is required under a statute of limitations. By a parity of reasoning, then, the evidence in the present case was altogether inadequate to establish a payment on the note, or its resulting consequence a new promise, subsequent to the date of the certificate in bankruptcy. It was therefore error for the court below to refuse the application for a new trial, on the assumption that a subsequent promise resulted from an *ex parte* indorsement. It must be apparent that a rule giving effect to evidence which the holder of a note may at any time manufacture for himself, in order to evade a decree of bankruptcy or a statute of limitations, would be subject to great abuse, to a dangerous evasion of law, and a corrupting perversion of truth.

Judgment reversed.

Wm. G. Woodward, for plaintiff in error.

W. P. Clark and J. S. Richman, for defendant.

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT OF THE STATE OF IOWA,

DUBUQUE, JULY TERM, A.D. 1849.

In the Third Year of the State.

Present:

HON. JOSEPH WILLIAMS, *Chief Justice.*
HON. GEORGE GREENE, *Judge.*

GOODWIN *et al.* v. THOMPSON.

A father cannot recover damages against a person for procuring the marriage of his daughter, who in good faith and without force or imposition entered into a marriage contract when between twelve and fourteen years of age. The statute which provides that male persons of the age of eighteen years and female persons of the age of fourteen years may be joined in marriage, is merely cumulative, and does not abrogate the common rule, which fixes the age of marriage consent for males at fourteen and for females at twelve years of age.

A rule of common law is not repealed by implication.

The right of a husband over his wife is paramount to that of her parent.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by WILLIAMS, C. J. Rufus Thompson instituted his action for trespass on the case against Archibald Goodwin, John Gilson and Benjamin Alcorn, in the

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district court of Dubuque county, to recover damages for enticing and procuring his daughter Louisa Thompson to marry one Jefferson Goodwin against his consent, thereby depriving him of his right to the control, guardianship, society and service of the said Louisa, she being his daughter and a minor.

When the cause was called for trial in the district court the attorneys for the parties appeared. Whereupon the attorneys for the defendants filed their general demurrer to the first count in the plaintiff's declaration upon which issue was taken. The demurrer was overruled. The parties, by their attorneys, then filed of record in the case the following agreements :

" It is agreed between the parties to this cause, that a marriage license was issued by the clerk of the district court of Jackson county, to Jefferson Goodwin, in the month of March last, authorizing any legal officer to solemnize marriage between Jefferson Goodwin and Louisa Thompson, and that by virtue of said license, said parties were married in Jackson county, in said month of March, by an acting justice of the peace in said county, and that this agreement is to stand in lieu of and be equivalent to a certified copy of the records of the clerk of the district court of Jackson county, of said marriage."

" It is also agreed by the parties that this cause shall be continued to the next term of this court for trial on the merits; that the cause, in the meantime, shall be tried in the supreme court on the demurrer to the first count in the declaration; and that the issue is to be made up to all the counts within ten days after the session of the supreme court in July next. The costs to abide the final event of the suit. This agreement to be part of the record."

These agreements were signed by the attorneys of the parties and are of record in the case.

The only question for adjudication is presented by the defendants' general demurrer to the first count of the plaintiff's declaration.

In this count the plaintiff complains "that the said

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defendants, combining and confederating together, and contriving, &c., to injure and aggrieve the said plaintiff, and to deprive him of the service and assistance of one Louisa Thompson, the daughter and servant of the said plaintiff, and a minor under the age of fourteen years; as also to deprive the said plaintiff of the company, society, guardianship, education, nurture, control and service of his said daughter, heretofore, to wit: on the tenth day of February, in the year of our Lord one thousand eight hundred and forty-nine, and on divers days and times between that day and the filing of this declaration, at the county aforesaid, did unlawfully, wrongfully, unjustly, wickedly and fraudulently entice, persuade and procure the daughter and servant of the said plaintiff to depart from and out of the care, control, guardianship and service of him, the said plaintiff, and to marry one Jefferson Goodwin, to wit, at the county aforesaid." The declaration then proceeds to aver, that in consequence of the procurement and enticement aforesaid, the said Louisa, the daughter and servant of the plaintiff, departed from and left the house, care, guardianship and control of the plaintiff aforesaid, and continued to the time of the commencement of this suit from his care, control, &c. Then follows the allegation, that the plaintiff has sustained great damage by reason of the loss of her society, service, expenditure of money and time in his endeavors to procure her return, anxiety and trouble of mind, &c. All of which doings, he avers, was without his knowledge or consent, and against his will. Damages are alleged to the amount of \$200.

The only question to be decided is this: Can a father maintain an action of trespass on the case, and recover damages for the loss of service, &c., against a person or persons for procuring the marriage of his daughter, who is a minor, when she has voluntarily and in good faith entered into the marriage contract without any allegation of force or imposition having been practised on her by her husband or the defendants, so far as the marriage

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is concerned, and when the marriage has been legally solemnized in good faith?

By the agreement of the parties of record in the case, it appears that the marriage was voluntarily contracted and solemnized in accordance with the law of the state, and it does not appear that there is any complaint on part of the parties to the marriage contract, the husband and wife. The action is simply at the instance of the father for damages alleged to have been sustained, for the loss of his daughter's service, society, &c.

The legislature of this state have enacted, "that male persons of the age of eighteen years, and female persons of the age of fourteen years, not nearer of kin than first cousins, and not having a husband or wife living, may be joined in marriage. *Provided always*, That male persons under twenty-one years, female persons under the age of eighteen years, shall first obtain the consent of their father respectively, or, in case of the death or incapacity of their fathers, then of their mothers or guardians." The statute also provides, that ministers of the gospel complying with its requisites, and justices of the peace, may solemnize the marriage contract; and directs that a marriage license shall, before marriage, be issued by the clerks of the district court of the county wherein the ceremony shall be performed.

The 11th section of the act imposes a forfeiture of \$500 on any justice or minister who shall solemnize any marriage within the state, without a compliance with the statute, and also forbids any unauthorized person to solemnize the contract under the same penalty.

By the common law marriage is held to be a civil contract. To render the contract valid the parties must be willing and able to contract. The age of consent for a female has been fixed by the civil law at twelve years, and the male at fourteen. Under that law, if the parties were under the age prescribed, the marriage was only held to be inchoate and imperfect; and when either of them arrived at the age of consent aforesaid, they might disagree and

declare the marriage void. The canon law, however, had regard to the constitution more than the age of the parties, and therefore held, that if they were in that respect competent, the marriage was good, whatever the age might be. By the common law of England, it was held that if a marriage was solemnized between parties who had not arrived at the age of consent, still, when they arrived at that age, if they agreed to continue together as man and wife, they need not be married again. Black. Com., 436, 437.

The same principles are recognized as being established by the common law by Chancellor Kent in his 2 Commentary, 78. Discussing the common law, as to the capacity of persons to make the marriage contract, after fixing fourteen years for males and twelve years for females as the age of consent, he proceeds to say that "the law supposes that the parties at that age have sufficient discretion for such contract, and they can then bind themselves irrevocably, and cannot be permitted to plead even their egregious indiscretion, whatever the result of it may be. Marriage before that age is voidable at the election of either party on arriving at the age of consent, if either of the parties be under age when the contract is made."

Such being the common law in force within this state, it is clear that this marriage is not void, notwithstanding the statute. Statutes will not be construed to have an effect beyond that which is to be gathered from the plain and direct import of the terms used in declaring them. Effect by implication will not be given to them, so as to change a well established principle of common law.

The act regulating marriages within this state merely declares what description of persons "may be joined in marriage," and what are the respective duties of ministers and justices of the peace, who are authorized thereby to solemnize the marriage contract. By it the solemnization of the contract by such minister or officer, without a compliance with its requisitions, is punishable by a penalty of \$500. A due regard for the public morals and the

interest of the community, in view of the marital rights, duties and obligations, is recognized and inculcated. The sanction of religious and legal rights is enjoined to elevate this contract, so far as form is concerned in making it, above all others among men. Such a provision, by statute, whilst it designates the moral character of a community, operates as a preservative of the interests which are involved in one of the great relations which constitute the **foundation of society.**

In this brief view of the common law, in relation to this subject, then, how does the case stand as affected by the statute? There is no prohibition of the marriage of a minor, who may be under fourteen years of age, expressed. The statute is merely cumulative in its operation, and cannot have the effect of repealing the common law, so as to render the contract void. Such has been the decision of this court, as well as the courts of last resort in nearly all the states of the Union, in declaring the effect of statutes similar to ours. *Wycoff v. Boggs*, 2 Halsted, 128; 2 N. H., 268; 3 Marshall, 370.

We will now consider the case in view of the rights of the parent, the child and the interests of society, as existing in this country.

The parties to the contract being capable of making it, and it being valid in law, so as to secure the parties to it all their legal rights, and bind them to the observance of the obligations and duties involved, it clearly follows that the law holds the claims of the husband from the time of the marriage as paramount to those of the parent. The common law observes the divine injunction, that "forsaking father and mother, the husband and wife shall cleave together, and that they twain shall be one flesh;" in effect recognizing a great and holy domestic relation, essential to the well-being of our race and conservative of the paramount interests of society and government. Thus the natural tendency of the human heart, under the control of divine and municipal law, is made to operate as a blessing to man, instead of a curse.

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But it is contended that the common law gives the parent the control, society and service of the child during the entire term of minority, which is until the age of twenty-one years. This, as a general principle, is true. Every general rule, however, has its exception. Exigency arising from circumstances beyond the control of human foresight sometimes requires the special interposition of rightful power, to aid the best general system in working harmoniously to the attainment of the most truthful result. In England, from whence we derive our common law, many reasons, in view of the governmental organization there, exist for establishing a general system on this subject, and determining its operation differently from that which necessarily must prevail here. Such is the law of descent of estates, primogeniture, &c., that their distinctive and controlling power operate directly upon the relation of parent and child. These distinctions do not exist in this country. The domestic or private relations therefore are to be so far held independent of them. In this country there is no legalized classification of the citizens, establishing castes in society. We have, and can have, no such thing, under the constitution of our country, as a legalized nobility, possessing privileges by law peculiar to themselves as citizens, and a common people whose condition is distinctly fixed by restraining laws. The peculiar institution of England, in this respect, must necessarily have operated with controlling effect in shaping the common law there. Nevertheless, from what we have already said, it is seen that even there, in the absence of special statutory provision, a marriage after the age of consent is held valid. The minor child, taken, by the obligations of the new relation established by the solemnization of the marriage contract, from the control of the parent or natural guardian, is held to be amenable to the law of the land governing husband and wife. This being the case under the common law, it is clear that rights belonging to the parent must be interfered with by the observance of the duties of the marital relation; so that

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we see the incompatibility of both these relations existing at the same time without interception as to the same person, in respect of his claims and obligations. The wife cannot be held to "serve two masters," therefore the right of the husband must prevail.

By the common law, then, there is no difference between the case of a minor twelve years old and one twenty years old, in effect as to the consequences of the contract.

This being the common law, it can only be changed by statutory provision such as was resorted to there. By the statute 26 George II., ch. 33, it was enacted, "That all marriages celebrated by license, where either of the parties is under twenty-one, without the consent of the father, or if he be not living, of the mother or guardian, shall be absolutely void." This superseded the common law, but we have no such statute. The effect of this statute is discussed by Sir William Blackstone; among other things he says, "Much may be said, and has been said, both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherever they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes, and thereby destroying one end of society and government."

In this country the law of itself recognizes no higher and lower class. Its effect is intended to be uniform without respect to persons.

If an action will lie on behalf of the parent for the procurement of the marriage of his daughter without doing violence to her rights, she being a minor, whether she be of the age of thirteen years or twenty, what would be the consequence? Two-thirds, perhaps more, of the females of our land have been, and most likely will be,

married before they arrive at the age of twenty-one years. Litigation for speculation might be resorted to; and a strong motive would be furnished to the parent to withhold his consent. Long and well established usage promotive of the best interests of society would be disturbed by restraining marriage; and the public interests would be materially injured, morally and politically. In this case it is not pretended that the daughter of the plaintiff was imposed upon by her husband or the defendants below; that any force or fraud was used or practised by him or them upon her; or that anything was done, *mala fide*, of which she or the plaintiff complains; but on the contrary, that the parties were married, in good faith, with her full consent. In this, the case at bar is distinguished by plain marks from the case in *Hill v. Holbart*, 2 Root, page 48. In that case a gross fraud was practised upon the daughter; she was seduced, and afterwards deceived into a marriage with a vagrant, who was hired to practise the imposition, in the garb of respectability, in order to prevent a cause of action at law. She was made the victim of outrage. There is no such allegation here. This case stands upon the complaint of the parent, on the ground of the loss of service. The books are, so far as we have been able to find them, barren of cases like this. Public opinion, as well as policy, co-operating with private interest and convenience, by long usage seems to have established the right of the husband to the society and service of the wife, though she be a minor, to the exclusion of that of the parent after marriage. Indeed, a natural sense of justice, in the exercise of a mind uninfluenced by passion or caprice, would dictate the acquiescence of the parent, in the legitimate results of this contract, when legally consummated; in which the dearest interests of his offspring are involved. We hold that parents should maintain and exercise a controlling, advising influence over their children, and such is their right in the forming of matrimonial alliance; and that it is the duty of the child to abide by their counsel and requirement.

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But to render liable any or all persons who might, in the spirit of kindness, actuated by pure motives, be present at the marriage ceremony, or afford countenance to the child on an occasion of so much interest, would be in violation of right, propriety, and public interest. Upon a full consideration of the case, in view of the public and private interests and rights involved in the question presented, we are of the opinion, in the absence of fraud, imposition, or violence, affecting the rights of the child and thereby affecting the relative rights and duties of parents, that this action cannot be maintained, and that the court erred in overruling the demurrer.

Judgment reversed.

P. Smith, for plaintiffs in error.

L. A. Thomas, for defendant.



SHAW v. LIVERMORE *et al.*

Where S. agreed to deed a lot to L., upon condition that he would **make certain improvements and live upon the lot**, it was held that if L. performed the substantial conditions with ordinary diligence, he was entitled to a specific performance.

Equity will extend relief, even if there has not been a strict legal compliance with the terms of the contract, if it can be done consistently with the essence of the agreement.

Where one of the conditions upon which a deed should be made was, that the purchaser should reside upon the lot, but the term of such residence was not designated, it was held that as the purchaser had complied with all the other conditions to secure title, and had resided upon the lot nearly two years before he left it, that such leaving would not be an abandonment, and that he was entitled to a deed.

The recision or specific performance of a contract is left to the sound discretion of the chancellor, to be exercised upon a consideration of the circumstances of each case, under applicable general rules of equity.

Evidence will not be considered which is not responsive to the bill or answer.

IN EQUITY. APPEAL FROM JACKSON DISTRICT COURT.

Opinion by GREENE, J. The bill in this case was filed by John Shaw against Allen Dutton and Zalman Livermore for a specific performance. In substance it avers, that in May, 1845, Shaw contracted to sell Dutton a certain one acre lot of land, in the town of Springfield, in Jackson county, upon the condition that Dutton should build a line fence between said lot and the adjoining land, belonging to said Shaw, on the east and south sides of said lot, and pay the sum of \$1.25, and that so soon as Dutton should build said fence and pay said sum of money, Shaw was to make him a deed in fee simple to said lot. The bill further alleges, that in pursuance of the agreement Dutton entered upon the premises, erected a dwelling house thereon, and made other improvements under the observation and notice of said Shaw, and without any objection from him; that in the spring of 1847, Dutton made the fence, tendered the money, and demanded a deed, which was refused; that Shaw intended to cheat and defraud Dutton; and that Dutton sold the premises to Livermore in April, 1847. The bill concludes with a prayer for a deed in accordance with the contract, and for general relief.

The answer admits that there was a contract for the land designated; but denies that the terms of the contract were such as are set forth in the bill. It states that Dutton, who represented himself to be a good house carpenter and cabinetmaker, agreed to settle upon the land, build a good house thereon, and also build a good board fence, five and a half feet high, on the east and south sides of the premises, and carry on his trade; and that, upon the performance of those conditions, the respondent was to give and grant the lot of land in question. But the answer absolutely denies that the complainant ever complied with those conditions, and charges that he did not carry on his trade upon the premises, and that he declared his inten-

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tion to abandon, and did abandon the premises, and that he stated on divers occasions to the respondent that he did not expect him to give a deed for the land, as he had not fulfilled the contract. Respondent then admits that complainant entered upon the lot, and charges that during the time he remained there complainant repeatedly promised respondent that he would comply with the contract, and respondent was induced to believe that he would do so until he abandoned the premises; admits that some fence was made in the spring of 1847, but denies that it was such a fence as the contract required; admits that Shaw sold premises to Livermore, and that a deed was demanded and refused, because the contract had not been complied with on the part of respondent; and the answer denies all fraud, and the right of complainant to relief in equity.

The complainant filed a general replication.

Depositions were taken by which it is proved by one witness, that Shaw admitted the sale of the lot to Dutton for the sum of \$1.25, and upon condition that he would build a house on the lot; that in the summer of 1845 Dutton built the house upon the lot, and moved into it; and that there was a board fence built on the east and south sides of the lot. Another witness testified that Shaw told him that he had done more than any other man in getting people to settle at Springfield, that he had given Dutton an acre lot, and on being told that he got pay for it, replied that he only received government price for the land. The same witness swore that Dutton built a house upon the lot, and lived in it until May, 1847; that Dutton, on two occasions, tendered \$1.25 to Shaw, and demanded a deed, which was refused, and that the fence was finished around the lot before the final tender and demand. Other witnesses testified in substance to the same effect.

Depositions were also introduced in behalf of respondent in support of averments contained in his answer; but the testimony is not sufficient, we think, to contravert the

material allegations in the bill, as sustained by preponderating evidence.

The court referred the case to P. B. Bradley, Esq., as a master to assess the value of the improvements upon the premises, who accordingly returned the value, under the estimate of witnesses, at \$100.4.

Upon a full hearing, the court granted the prayer of the petition, and decreed a conveyance of the premises to the complainants, with a proviso that the decree should be void if Shaw paid complainants \$100 within twenty days.

To this decree several objections are urged, to which we will briefly advert.

1. It is urged that complainants are not entitled to a specific performance, because Dutton had not performed his part of the agreement. But we think this objection is not maintained by the facts as they appear in the bill, answer and depositions. They disclose no serious default on the part of Dutton. He appears to have acted in good faith, and to have taken all necessary steps towards a substantial compliance with the terms of the agreement. He appears to have built a house and the fence upon the lot as stipulated; to have tendered the money and demanded a deed, and to have resided upon the premises as a carpenter and joiner for nearly two years before he sold his interest to Livermore, and it is not pretended that these things were not done within a reasonable time. At least, the important conditions, which would entitle him to a deed from Shaw, appear to have been performed with ordinary diligence. If the facts in this case had indicated gross laches, or inexcusable negligence in performing the conditions of the contract on the part of the complainant; or if, after the inception of the agreement, and the refusal of the respondent to execute the deed, those facts had shown a material charge affecting the rights and obligations of the parties; the broad, equitable and just rules of chancery jurisprudence would be violated by enforcing a spe-

cific performance of the contract. But, on the other hand, this court will extend relief to the party who seeks it, even if there has not been a strict legal compliance with the terms of the contract, where such non-compliance does not affect the essence of the agreement, does no violence to the manifest intention of the parties, nor shows gross negligence in the complainant. 2 Story's Eq. Jr., §§ 771, 776, 777; *Taylor v. Longworth*, 14 Peters, 172, 175.

2. The next objection urged is, that the object of the agreement was lost to the respondent by the complainant's abandonment of the premises. If they had been abandoned by complainant before he had sufficiently performed the conditions of the contract to entitle him to a deed from respondent, this objection would have been tenable. But, as we understand the case from the evidence before us, the leading conditions upon which Shaw agreed to convey the lot to Dutton were: 1. The erection of the division fence; 2. Of a house on the lot; 3. The payment of \$1.25; and 4. As an incident to those leading conditions, Shaw appears to have attached much importance to Dutton's living upon the premises as a mechanic, for the convenience and benefit of the town of Springfield. But, in relation to this fourth stipulation so much relied upon by respondent, the case does not show any definite agreement between the parties. We cannot, therefore, regard it as an essential element of the contract. Besides, if it should be deemed essential, it cannot amount to a valid objection to a specific performance, because there was no portion of time designated for the occupancy of those premises by Dutton as a mechanic, before he should receive a deed for them; and in giving a construction to this doubtful branch of the contract, we think it reasonable to assume that, as Dutton had occupied the premises nearly two years before selling his interest in the property, and delivering his possession to Livermore, and as he had mainly performed the more important conditions of the purchase from Shaw, he brought himself within the vale of equitable relief. We can observe

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nothing in the transaction to support the position that, as a condition precedent to complainant's right to a deed, he should have continued in actual possession of the lot, and in his mechanical occupation, during a still longer probationary term.

3. It is proposed that unless complainant has made out a clear and conscientious case, a court of chancery should, in the exercise of a sound discretionary power, leave the party to his action at law for damages. It is true in equity, that the determination of all cases respecting the recision and specific performance of contracts is a matter of discretion in the court, and not of right in the party; and in the exercise of that discretion upon a sound, reasonable and unbiased consideration of the peculiar circumstances connected with each case, a court should call in the aid of general rules and principles of equity jurisprudence, so far as their application may be apparent. Thus guided in the exercise of that discretionary power, we think the circumstances of this case, together with the certain, fair and just objects of the agreement, show that the decree of the court below is reasonable and proper.

4. But another objection, to which it may be well to advert, is, that the complainant discharged respondent of his contract. This position is assumed from a portion of the evidence. But as that evidence is not responsive either to the bill or answer, and is not only impertinent, but vague and unreliable, we conclude that this objection is also without foundation.

Decree affirmed.

L. Clark and F. A. Chenoweth, for appellant.

P. Smith, for appellee.

Gaveny v. Hinton.

GAVENY v. HINTON.

Where a grantor reserves a house, rails, &c., which were on a strip ten rods wide and one hundred and sixty rods long, on the west side of the quarter section of land sold, but the house, &c., were afterwards found to be a short distance east of the ten rod strip, it was held that the grantor was entitled to the house.

Course and distance should yield to natural and artificial objects which are made part of the description of land.

In construing contracts, that which is most material and certain, and most conformable to the intention of the parties, should prevail.

ERROR TO JACKSON DISTRICT COURT.

Opinion by WILLIAMS, C. J. This cause was tried at the May term, 1849, of the Jackson county district court. The plaintiff, Hinton, sued Gaveny, in trespass, for "throwing down and hauling away a certain building, on the west side of Hinton's land, and claimed for his damages \$75. He obtained a verdict and judgment for \$25. The record shows that Hinton, the plaintiff, had entered, at the land office at Dubuque, the south-east quarter of section 17, township 85, range 4, east of the fifth principal meridian. The entry was made in February, 1849. Afterwards, on or about the 1st day of April, of the same year, Gaveny took down and carried away the house which stood on the land. This is the trespass of which the plaintiff complains.

It appears, also, that Gaveny had taken and occupied the land, as his claim, previous to the time of Hinton's entry. He had made improvements on it by building the house in question, fencing, planting fruit trees, &c. Hinton, to adjust the matter between him and Gaveny, became the purchaser of his claim to the land. Thereupon Gaveny made him a release, or a quit claim deed, which is in the following terms, viz.: "Know all men by these presents, that I, John Gaveny, of the county of Jackson and state of Iowa, in consideration of the sum of

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\$25. to me in hand, paid by Silas Hinton, of the county and state aforesaid, have this day bargained, sold, released and relinquished all my right, title, interest and claim in and to the south-east quarter of section 17, township 85, range 4, east of the fifth principal meridian, to have and to hold, to him the said Hinton for ever; except the log house, stable and corn crib, and hen house, and rail fencing and apple trees that are standing on the west side of said quarter section, being a piece of ground ten rods wide and one hundred and sixty rods long, on the west side of said quarter; which buildings and improvements I have the right to remove from the land hereby bargained, sold and released, on or before the 1st day of December next. But the said Hinton shall have the right to occupy the said land, to cultivate and improve as much as the said Hinton may think proper. Said house is not to be occupied by any person while it remains where it is, after the 1st of March next; and if the ten acres of land hereby sold shall take any of the wheat that was put in by Thomas Young, the said Young shall have the right to take said wheat away; and I do hereby agree, and authorize the said Hinton to enter the land aforesaid at the land office in Dubuque." The contract bears date February 14, 1849.

Exception was taken to the charge of the court below, as given to the jury, affecting the contract between the parties in relation to the house, which is the subject of the alleged trespass. For a defence to the plaintiff's action the defendant Gaveny set up, by plea, his right to the removal and ownership of the house, on the ground that it had been expressly reserved from sale by the contract between him and Hinton. He relied on the written contract to show the intention of the parties in relation to the house. Hinton, the plaintiff, replied to this allegation of the defendant, that the house was not within the strip of land described, by limits, as to extent, in the agreement, to wit: "standing on the west side of said quarter, being a strip or piece of ground ten rods wide

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and one hundred and sixty rods long, on the west side of said quarter." It appeared from the evidence that some time after the contract had been made, it was ascertained that the house in question was not within the area of land described as "ten rods wide and one hundred and sixty long;" but that it stood a short distance outside of it.

The error assigned, upon which the reversal of the judgment of the district court is urged, is founded on the instruction given to the jury. The judge charged the jury as follows, viz:

"The question is one purely depending upon the contract between the parties, and there are no equities which would authorize the court or jury to lean to either side. If the contract was fully understood and read by the parties before being executed, and either one has a technical advantage over the other, they must abide by it, and take the consequences thereof."

After stating the agreement of the parties, he proceeds to say: "The construction of this contract is not ambiguous, and is a matter of law. I think that no other house was reserved by the contract to Gaveny, except such a house as was, or might be *included in a strip on the west side of the quarter*, ten rods wide and one hundred and sixty rods deep, and if the house in dispute lay east of this strip which would be made by ten rods wide and one hundred and sixty rods deep, the plaintiff is entitled to recover, if it was removed by the defendant, and that the measure of damages is the value of the house where it stood."

The question involved here depends for solution upon the intention of the parties to the contract, as expressed therein. It is clear that at the time the house was removed by Gaveny, Hinton was the owner of the land in fee simple. Without his consent it could not be taken away, legally. Did he give that consent? A fair examination of the contract will, we think, answer the question in the affirmative. Gaveny, for a money consideration, sold to Hinton his right, title and claim to the land, reserving

the house, &c., *described* as being on a strip or piece of the land sold, on the west side of the quarter so sold, ten rods wide and one hundred and sixty rods long. The house, fence, &c., were excepted or reserved to Gaveny, describing the land upon which it was supposed they stood. It must be presumed from the language of the contract concerning the reservation of the house, that the parties in treating of it considered, and had an understanding at the time, that the area of land "ten rods wide and one hundred and sixty rods long on the west side of the quarter" would include the house, fence, &c., which were excepted and reserved from sale. The reservation of the house, &c., together with the money paid by Hinton, formed the consideration for which Gaveny parted with his claim to the land, and suffered him (Hinton) to take the land by entry at the Dubuque land office. The area of land as limited, bounded and defined by lines, is nothing more than a *description* of the ground on which the house, &c., were supposed to stand. There is no allegation that there was any other house on the land. Hinton, having accepted and availed himself of the interest and claim of Gaveny, under the contract, was bound to do so, subject to the terms thereof as to the reservation. The consideration upon which the house was reserved for the use and benefits of Gaveny was good and valid in law. As a legitimate incident to the contract, Gaveny had a right to remove it and appropriate it to his use. This is not a question of boundary and definite admeasurement of land, involving, as the subject matter of controversy, the quantity or number of acres contracted for in the sale. If this were the question, then it would be necessary fully to examine the law of description, and monumental landmarks, for application to this case. But, even then, the law is well settled, that course and distance must yield to natural and artificial objects which are made part of the description; they being susceptible of direct ascertainment as monuments designative of the intention of the parties to the contract.

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In such case, course must be varied and distance shortened, so as to conform to natural or artificial objects which can be clearly ascertained, as set forth in the grant under the contract. Such monuments or landmarks, as a river, spring, stream, house or marked tree, are generally familiar to the contracting parties, so as to be made demonstrative of their intention. The case of *Jackson v. Moore*, 6 Cow., 717, presents much and able discussion on this question.

Among other things there recognized as cardinal in doctrine, as of the construction of deeds, the judge says, "In construing deeds, effect is to be given to every part of the description, if practicable; but if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to that thing, the grant will not be defeated; but those circumstances will be rejected as false or mistaken." *Jackson v. Clark*, 7 John., 217; *Jackson v. Loomis*, 18 *ib.*, 81; 4 Mass., 146; 5 East., 41. The principle established by this decision, we think, is essential to a fair and just construction of the contract. The house is the substantive matter of the contract, so much so that as such it is designated, and reserved in the most positive manner as the property of Gaveny. If it had been named in the contract as descriptive of the boundary of land, as a monument for the ascertainment of quantity, or limit, it would have operated so as to control and establish course and distance; certainly then, when it is made a substantive matter, of the value and consideration of the contract, misapprehension or mistake as to course and distance should not control and destroy a right so manifest. It is urged on the part of Hinton, that, "in construing the contract, the intention of both parties must be taken into consideration by the court; that it is not the only question whether Gaveny thought he was getting the house; but that it is equally a question whether Hinton thought so, and that the conclusion must be derived from the terms of the agreement itself." This is all true. The

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agreement of the parties by its terms expressly reserves the house for Gaveny. By all that is fair in construction we must believe that Hinton, as well as Gaveny, considered and knew that the house was to be the property of Gaveny, or it would not have been so expressly stated in the contract. When such is the contract, if Hinton knew, or thought that the house would be found by the course and distance of the lines described, to stand outside of the area of ten acres, he should have been careful to have his agreement made with a proper reference to such a state of the case. He cannot be allowed to make void or defeat the right *expressly* given by his contract, by an argument based on this position. The execution of the contract, and acceptance of the rights and benefits arising from it, binds him to the observance of the rights of Gaveny, in compliance with its terms, as expressed therein.

In construing contracts, that which is most material and most certain in description shall prevail over that which is less material and certain. 1 Cowen, 612; 5 *ib.*, 371; 6 Wheat., 582; 7 *ib.*, 10.

This being the rule, and the intention of the parties being manifest in relation to the subject matter in controversy, there is error in the instruction of the court, by which the description of the area of land, by course and distance, is made to exclude the house from the effect of the contract; and by virtue of which the plaintiff recovered in the judgment of the court below.

Judgment reversed.

P. Smith, for plaintiff in error.

L. Clark, for defendant.

Taylor v. Barber.

TAYLOR v. BARBER.

In an appeal to the district court, where the appellant is in default, the judgment of the justice may be affirmed.

By going to trial on the merits without exception to the cause of action, any defect in that particular would be considered as waived by the defendant. A verbal statement of plaintiff's demand before a justice, entered upon his docket, and indorsed upon the writ, is all that is required by the statute of 1844.

Mere irregularity and deficiency of form in proceedings before justices should be regarded with liberality.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by GREENE, J. Barber sued Taylor before a justice of the peace. It appears by the transcript of the record that the plaintiff filed his affidavit according to law, averring an indebtedness to him from the defendant of \$100; a writ of attachment was issued; the parties appeared; witnesses were examined, and a trial had, upon which the plaintiff recovered a judgment for the sum of \$87.20 debt and interest. Thereupon the defendant took an appeal to the district court, and failing to appear there, judgment was rendered against him by default for the same amount, and in affirmance of the judgment rendered by the justice.

The errors assigned and urged to these proceedings may be considered under two heads.

1. It is contended that as the record does not show the action to have been brought on a note or a written instrument, judgment by default could only have been rendered upon the verdict of a jury. In support of this position, the thirteenth section of the practice act, Rev. Stat., 471, is cited. This section authorizes the court to direct the clerk to assess damages when judgment is given by default on any instrument of writing; but provides that in all other actions, when judgment shall go by default, the plaintiff may have his damages assessed by a jury. The regulations of this section we regard as applying particu-

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larly to actions brought originally in the district court, and not as an imperative rule in appeal cases.

The eighth article of the justices' act, under the head "Of appeals and proceedings thereon in the district court," defines the practice to be pursued in many particulars, when cases are taken to that court by appeal; and these special provisions for such cases should prevail over the general rule established by section thirteen of the "practice act."

The second, third and sixteenth sections of the eighth article above referred to, clearly contemplate an affirmance of the judgment of the justice without a trial *de novo*, or a writ of inquiry, to redetermine damages which had previously been assessed in the justice's court; and certainly no condition of a case could more manifestly justify an unqualified affirmance than the default of the appellant. His failure to appear, or to prosecute the appeal with due diligence, shows at least an acquiescence in the decision of the justice, and a strong presumption that the appeal was taken for delay.

The statute evidently provides for no reassessment of the debt or damages in an appeal case disposed of by default, nor can we conceive any necessity for it either in reason or in justice. Had there been no trial or inquiry in the inferior tribunal upon a claim not reduced to writing, there would then be necessity and propriety in a writ of inquiry, and an assessment of the damages in the appellate court; but why should this be required in cases of default which have once been fully tried and determined? The appellant is only entitled to a trial anew in the event that he diligently prosecuted his appeal; and being in default in that particular, the former trial is conclusive against him.

But it is urged that the district court could not render such a judgment by default, because section fifteen of said article eight provides for the trial of the same cause of action *only* in the district court which was tried before the justice. Clearly this section has no application to the

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proceeding, if the judgment of the justice is affirmed without a trial anew, and as clearly such an affirmance is recognized by the three sections of the statute before cited. The judgment may either be affirmed in the district court, or on a trial anew be rendered against the appellant. If affirmed, section fifteen has no bearing, but if determined by the latter alternative, it would prevail, and the trial should be conducted accordingly.

2. Connected with section fifteen as to the cause of action, it is objected that it does not appear that any cause of action was tried before the justice, and, as a consequence, there was no cause of action in the district court over which jurisdiction could be entertained. In support of this position, Rev. Stat., 315, § 4, is referred to, which requires the plaintiff, when he commences his suit, to set forth in writing a plain statement of his demand or cause of action. There are three reasons why this objection cannot prevail.

1. By proceeding to trial upon the merits, without taking exception to the cause of action, any defect in that particular must be considered as waived by the defendant.

2. The affidavit filed by the plaintiff at the commencement of this suit we should consider a sufficient statement of this demand, even if the fourth section of the statute was in force.

3. But that section is repealed by statute of 1844, p. 42, § 14. A verbal statement of plaintiff's demand entered upon the docket of the justice, and indorsed upon the writ, is all that is now required by the act to regulate proceedings before justices of the peace.

By courts generally, it is not expected that technical nicety and legal precision can characterize the proceedings of justices of the peace; and hence irregularity and deficiency in form are viewed with liberality, and the doctrine now prevails, at least in American courts, that it is sufficient if there appears to be a good ground of action within the justice's jurisdiction, and if the substantial merits of the cause have been tried. This case having been

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conducted conformable to this rule, and with even more than ordinary correctness, under the regulations provided by our state, we cannot feel justified in disturbing the judgment.

Judgment affirmed.

L. Clark, for plaintiff in error.

Davis and Bissell, for defendant.

CASS *et al.* v. THE STATE.

Where a petition for a change of venue sets forth the requisite facts verified by the affidavit of the party, it is the duty of the judge to grant the change to the nearest county, without any further proof or inquiry.

The statute of 1845 requires, in criminal cases, the facts stated in the petition to be verified by the affidavit of at least two respectable witnesses.

If a party complies with the statute, in his application for a change of venue, the court has no discretion to refuse, but should grant the change to the nearest county not made objectionable by the petition, without requiring any other testimony than the petition and affidavit.

A father may testify in a criminal case in behalf of his son.

ERROR TO CLINTON DISTRICT COURT.

Opinion by WILLIAMS, C. J. David Cass *et al.* were indicted at October term of the district court of Clinton county, for a riot. Before the calling of the cause for trial the defendants filed their affidavit and petition for a change of venue, as provided by the statute. The affidavit sets forth, that "they believe that the inhabitants of Clinton county are so prejudiced against them, that they cannot expect an impartial trial; and that the same causes exist in the counties of Scott and Cedar. The court refused to grant the change of venue until an examination of witnesses was had as to the grounds of affiants' belief. Joseph Cooper, one of the witnesses to the affidavit, was called

and examined on his oath, orally, by the court, as to the ground of his belief. He stated, "that as to Scott county, he knew nothing but from rumor. That he had attended the court in Cedar county last spring; that he heard a great deal said about this affair. That he heard more than half of the people at court talk about this matter, and, from what was said, he had formed the belief that there was prejudice, although he could not say that they seemed excited on the subject. They condemned the act, though they knew nothing of the defendants. He did not know that they had any knowledge of the affair, except by rumor. That he resided in Cedar county, and that he heard considerable said of the affair in the neighborhood where he resided." To this examination the counsel of the defendants excepted. Lyman Evans, another of the affiants, on motion of the attorney for the state, was then decided to be incompetent to make the affidavit, and testify as a witness in the matter, on the ground that he was the father of one of the defendants, and therefore interested. To this ruling of the court the counsel for the defendants excepted. Edward West, the other affiant, then stated, orally, that he testified only as to Clinton county. The court then ordered the venue of the case to be changed to Cedar county. To this proceeding of the court, the defendants' counsel excepted; and the following assignments are presented as grounds of reversal:

1. The court erred in awarding a change of venue in this cause from said county of Clinton to the county of Cedar.

2. The court erred in examining, orally, Edward West and Joseph Cooper, the witnesses whose affidavit was filed in support of the application for the change of venue.

3. The court erred in looking beyond the testimony set forth in the affidavit filed with the application for a change of venue.

4. If the court had authority to examine, orally, the witnesses West and Cooper, as to the ground of their belief as to the existence of the cause for a change of venue,

there was error in excluding Lyman Evans as a witness, in not examining him, and in deciding that said Evans was interested.

The record shows that the petition of the defendants, setting forth the cause for the change of venue, was verified by their affidavit in compliance with the statute; and that the truth of their affidavit was verified by the affidavit of Lyman Evans, Edward West, and Joseph Cooper, as required by the act of the 10th of June, 1845, regulating the proceeding of a change of venue in criminal cases.

As there is a propriety in settling the practice in proceedings of this kind under the statute, we will consider the subject matter involved in all the assignments of error.

Rev. Stat., 638, provides, "that either party may have a change of venue for the following causes :

" 1. That the inhabitants of the county are so prejudiced against the applicant that he cannot expect an impartial trial.

" 2. That the opposite party has an influence over the minds of the inhabitants of the county.

" 3. That the judge is prejudiced against the applicant."

This act, by the 13th, 14th, and 15th sections, is made applicable to criminal cases by providing the mode of procedure therein. In criminal cases, as well as civil, the affidavit of the party alone is made sufficient to establish the facts, or any of them, for which a change of venue may be obtained. In 1845, by an act approved June 10 of that year, and entitled, "An act amendatory of an act to provide for changing the venue in civil and criminal cases, approved 13th of February, 1843," the legislature changed the practice in criminal cases, as follows: Sec. 2. "That when a change of venue is prayed for in criminal cases, the truth of the affidavit of the party wishing the same shall be verified by the affidavit of at least two respectable, disinterested persons, before such change is allowed by the judges." The record shows that this statutory requirement was complied with in the case at bar.

These being the facts and the law of the case, we will proceed directly to the assignments of error.

Under the act of February, 1843, first cited, all that was necessary on the part of the person wishing a change of venue, was to file his petition, praying for it, setting forth therein any of the causes contained in that act, with his affidavit appended thereto, verifying the fact or facts set forth therein, and alleging that he has just reason *to believe* that he cannot receive a fair and impartial trial on account of the cause or causes set forth.

The party making the application having complied with the requisitions of the statute, it is the duty of the judge, without further inquiry, to award the change of venue to the nearest county where the causes assigned do not exist. Such has been the construction of this statute, and the practice thereon, as established by our courts. By it, we think, the obvious intention of the legislature is effectuated.

There is nothing in the amendatory act of June 10, 1845, which tends to vary this construction. It merely requires the affidavit of at least two respectable, disinterested witnesses, by which that of the applicant shall be verified; with this addition, in criminal cases, the law, so far as this case is concerned, remains unaltered.

The statute clearly sets forth all the acts necessary to be done to establish the right of the applicant to a change of venue, and the jurisdiction as to the county from and to which it shall be changed. The applicant having complied with the requirements of the statute, is entitled to the change of venue as his right. It is the duty of the court to grant it, without imposing any further requirement. There is no power conferred on the court, by the statute, to dispense with any of its requisitions to aid the applicants, nor can any be exercised to increase the duties thereby enjoined, and which might hinder him in obtaining his right. The statute vests no discretionary power in the court, by the exercise of which the change of venue might be refused, when the applicant has complied with

the statute by doing all that it required. The party could not be called upon to be prepared, upon the finding of an indictment in term time, to know and present facts and circumstances which, besides those required by the law of the land, might be necessary and sufficient to determine the discretionary power of the court in his favor as to his belief, or that of his witnesses, of the existence of prejudice in the minds of the inhabitants of a county against him. It is neither the belief nor the judgment of the court that is by the statute made the ground upon which the right of the applicant rests, but of the party and his witnesses. The county of Cedar was, by the affidavits, made as objectionable as was the county of Clinton. The court was bound, by the operation of the law, to act upon the affidavits alone, they being sufficient, and to grant the prayer by ordering a change of the venue to the nearest county where the causes for the change assigned did not exist. The object of the law is to secure to a party litigant an impartial trial. It frequently happens that suits are instituted involving questions which excite whole communities to such a degree that impartial or disinterested jurors cannot be obtained; and popular influence may operate to pervert or prevent the due course of judicial procedure, so that the arm of the law is stayed, or recklessly thrust forth regardless of right, and injustice instead of justice is the result. It may be alleged that the mere belief of the party and the verifying witnesses should not be considered as sufficient to warrant the change of venue; that parties, particularly in criminal cases, will resort to this provision of the statute with purpose to thwart the designs of law and justice, by the procurement of delay, &c. In answer to this, it is enough to say that this is a privilege or right, granted by an act of the legislature, which specially prescribes the grounds on which it may be claimed and had, as well as the duty of the court when called to act thereon. If to the acts plainly enjoined and required by the statute to be performed by the court, a discretionary power be added, how

and where is it to be limited? If the judge may refuse to credit the affidavits of the parties and their witnesses in one case, he may do it in another. In the exercise of such discretion, it is not to be supposed that the judge would be prepared to decide, from his own knowledge of the fact, whether the belief of the existing prejudice in the county alleged was well founded or not. To be informed, then, he would necessarily, upon the suggestion of the party opposed to the change of venue, be required to enter upon an examination of witnesses in the objectionable county to ascertain that fact; and thus the attainment of the object of the statute would be prevented.

But suppose the cause suggested for the change to be a charge of prejudice against the party in the mind of the judge himself, will it be contended that this act of the legislature should be so construed that the judge thus under its provisions charged with such prejudice, shall have a discretionary power, in a summary way, to question and inquire into the grounds of the belief of the affiants, and their verifying witnesses, and decide upon the right claimed? We think not. With a proper regard to the rule of construction, as to powers given by a statute like this, where a right is conferred on a party, and the duties clearly set forth, upon the performance of which it shall accrue, and where the duty of the tribunal whose province it is to grant that right is plainly pointed out, it cannot be allowed that a party shall be required to do more than is enjoined by the statute. That such power might be so exercised as to endanger, if not destroy, the rights of a party, is obvious.

By a proper construction of the act of the legislature, the action of the court is due upon the filing and presentation of the petition and affidavits of the party, and verifying witnesses, as required by the statute in criminal cases. These being sufficient, it is the duty of the court to grant the prayer of the party. If anything more be necessary to render the law perfect for the accomplishment of the end designed, it is the province as well as the duty of

the legislature to provide for it, in the exercise of their power

What has been already said substantially disposes of the questions raised by the second and third assignments of error; the affidavits being sufficient as filed, to establish the right of the defendants to the change of venue under the statute. The court, by requiring the witnesses to answer questions, assumed and exercised a power not conferred upon it by the statute, that being the only law which in such case the court could look to for its power, and the mode of exercising it. If the court could be permitted to go beyond the requirements of the statute, then there would be difficulty in saying where and how it is to be limited.

The fourth assignment of errors is founded upon the ruling of the court, by which the witness Lyman Evans was excluded from testifying, on the ground of interest. We have already said that the court below had not the power, under the statute, to require more of the party applying for a change of venue, than the petition and affidavits; and had no authority for requiring additional testimony by parol. That the right asserted and claimed depended entirely upon the sufficiency of the petition and affidavits, so far as the causes for the change of venue were concerned. But supposing that the examination of the witnesses by parol had been in accordance with the provision of the statute, still the court erred by deciding that Lyman Evans, who was the father of one of the defendants, was for that reason incompetent to testify, on the ground of interest. We cannot discover by what principle of the law of evidence a father would be prevented from testifying in a criminal case, on the part of his son, at any stage of the proceeding where evidence might be properly called for. The fact of the witness being the father of one of the defendants, however considered as to his credibility, could not operate to exclude his testimony. This would be the case where the relation of husband and wife exists. Neither of these would be allowed to testify

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for the other in civil or criminal cases. But the rule of incompetency for consanguinity has never, that we know, been extended to the relation of parent and child.

The ruling of the court below, ordering the venue to be changed to Cedar county, *is reversed*; and it is ordered that this cause be remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

Leffingwell, Wilson and Smith, for plaintiffs in error.

W. L. Burge and J. P. Cook, for the state.



HILDRETH v. TOMLINSON.

A general allegation of fraud, in a plea to an action on a promissory note, **is** sufficient.

A decision of the territorial supreme court will not be overruled unless palpably erroneous.

ERROR TO JACKSON DISTRICT COURT.

Opinion by GREENE, J. An action of assumpsit on a promissory note against the maker, Joseph E. Hildreth. Pleas, general issue, and one charging, in general terms, that the "note was obtained by fraud, covin, circumvention, and misrepresentation." A trial was had upon the general issue, and a judgment rendered for the plaintiff. To the plea of fraud the plaintiff demurred; the demurrer was sustained, and the decision of the court thereon is now assigned as error. But one question is presented in the case for adjudication: Are general allegations of fraud sufficient in a plea to an action on a promissory note?

Our statute provides, that if any fraud or circumvention

be used in obtaining the making or execution of any promissory note, it may be pleaded in bar to any action thereon. Rev. Stat. p. 453, § 6. Under this statute it was decided by our territorial supreme court, in 1846, in the case of *Hampton v. Pearce*, Morris, 489, that a general plea of fraud to an action on a promissory note is good. Since that decision, a general averment of fraud, in obtaining a note from the maker, has been deemed sufficient, until the present case arose in the court below. And even now, under the authorities and able arguments submitted to our consideration, we think no sufficient reason is presented for abrogating a practice which has generally obtained in our state since *Hampton v. Pearce*, and which was fully sanctioned in the decision of that case. To justify us in overruling a deliberate judgment of the supreme court, whether made before or since our state organization, the decision must appear to be palpably erroneous. But *Hampton v. Pearce* does not appear to us repugnant to any well recognized principle of law or rule of practice. A general plea that a deed was obtained by fraud is recognized as good by Chitty's Cr. Pl., 8 Am. Ed., p. 537. And to a plea of release he says, on p. 582, the plaintiff might reply "that it was obtained by *duress* or *fraud*, and it was then considered to be unnecessary and injudicious to state the particulars of the fraud." If such general allegations of fraud may be urged in the case of a deed, why may they not be equally applicable in the case of a note? and if good in a replication to a plea of release, why not equally good in a plea to a declaration on a note? Obviously, the same reasoning which will justify the one must apply with equal force in support of the other.

By many courts it has been decided that fraud in obtaining a promissory note, or to impeach the consideration of a simple contract, may be given in evidence under the general issue. *Brewer v. Harris*, 2 Smede & Marsh., 84; *Loffland v. Russell*, Wright, 438; *Armstrong v. Hall*, Coxe, N. J., 178; *Elliott v. Cogshall*, 4 Blackf., 240. That fraud constitutes a legal defence under the general issue,

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in a proceeding like the present, appears to be well supported by authority. Under such a practice it must be admitted fallacious to require specific averments of the facts, circumstances and character of the fraud. The general plea of fraud is of itself an important limitation to the field of controversy, which would otherwise be open between the parties under the general issue. It is difficult for us to understand how, under such circumstances, the general plea of *per fraudum* can work surprise upon the plaintiff as payer of the note. It narrows the controversy to a special point, with which the payer of the note cannot but be familiar, for it is confined to fraud or circumvention, averred to have been used in obtaining the execution of the instrument sued upon. The plea in effect acknowledges the making of the note, but seeks to avoid it, by showing that it was obtained in a transaction which would invalidate its enforcement, because it was fraudulent.

Respectable authorities, it is true, have been adduced in this case to show that a general plea of fraud is bad, and that the circumstances constituting the fraud should be specified. But most of those authorities are not applicable to promissory notes, nor could the decisions have been made upon statutes strictly analogous to ours; and while some of them may be regarded as in conflict with our decision in this case, we are still encouraged by good authorities to re-affirm the doctrine of *Hampton v. Pearce*.

In *Pence v. Smock*, 2 Blackf., 315, and in *Huston v. Williams*, 3 *ib.*, 170, general pleas of fraud to actions on bonds were held to be good; and in *Elliott v. Cogshall*, 4 Blackf., 239, the propriety of a general plea of fraud impeaching the consideration of a simple contract was, in a well considered and able opinion, held to be conclusive.

The same doctrine is entertained in Kentucky, not only in actions upon simple contract, but also upon deeds. 1 J. J. Marsh., 106; 2 Dana, 161. So in *Remberton v. Staples*, 6 Mis., 59.

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Under the foregoing reasons and authorities we conclude that a general plea of fraud to an action on simple contract is good.

Judgment reversed.

T. S. Wilson and *P. Smith*, for plaintiff in error.

L. Clark and *B. F. Spurr*, for defendant.

HEDINGER v. SILSBEE.

The amount of a plaintiff's claim need not be mentioned in the body of a summons from a justice of the peace; but the amount claimed, including interest and costs, should be indorsed upon the summons.

The want of an indorsement of the amount of plaintiff's claim cannot be taken advantage of after the general appearance of the defendant. Such appearance waives the want of an indorsement.

ERROR TO JACKSON DISTRICT COURT.

Opinion by GREENE, J. This was an action of assumpsit commenced before a justice, and taken to the district court by a writ of *certiorari*. By the affidavit for the *certiorari*, and the transcript of the justice, it appears that on the return day of the original writ, the defendant appeared and moved for a nonsuit, for the reason that the amount claimed was not mentioned in the body of the summons, which motion was not granted. The defendant then obtained a change of venue. On the day set for trial after the change of venue, the defendant moved for a nonsuit, on the ground that the amount claimed was not indorsed upon the summons, as required by statute. This motion was sustained, and a judgment of nonsuit rendered against the plaintiff. Within the time stipulated by statute, the plaintiff made application to the justice to have the nonsuit set aside and a new trial awarded. The

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application was granted, and the defendant duly notified of the time set for trial. Upon the day set for trial the parties appeared, and the defendant again made his motion for a nonsuit for defective indorsements on the writ, but the justice overruled the motion; whereupon the defendant abandoned the suit, and the cause having been fully heard, the justice rendered judgment in favor of the plaintiff for the sum of \$14.50. Upon this state of the proceedings, as set forth under the *certiorari*, the district court reversed the judgment of the justice. The correctness of that decision is now controverted, and it is claimed that there is nothing in the returns of the justice which shows sufficient error to justify a reversal of the proceedings.

So far as we are enabled to judge of the proceedings from the transcript of the justice, they appear to have been conducted with substantial correctness, so far as the legal rights of the plaintiff in error were affected by them. The motion first made by him was very properly overruled, because the statute does not require the amount of the plaintiff's claim to be mentioned in the body of the summons. The motion subsequently made before the justice to whom the venue was changed was improperly granted, because the defect complained of was waived by the previous appearance of the party, to move for a nonsuit on other and insufficient grounds, and for a change of venue. It is true the statute requires the justice to indorse upon the summons in such cases the amount claimed by the plaintiff, including interest and costs. Rev. Stat., 317, § 15. A writ without such indorsement is defective, but it is one of those defects which is cured by the general appearance of the defendant. Had he appeared specially, in the first instance, and suggested this objection to the justice, it would on motion have been sufficient ground for a nonsuit; but as he had previously appeared and moved for other objects in defending the action, that motion came too late, and was erroneously granted by the justice. This defective decision was sufficient cause, under the statute, to have the nonsuit set aside and a new trial granted. Rev. Stat., 324,

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§ § 3, 4. In that particular, we regard the proceedings of the justice as substantially correct, and as the judgment there appears to have been regularly entered, we think it was improperly reversed by the district court.

Judgment reversed.

P. Smith, for plaintiff in error.

S. Hempstead, for defendant.



CULVER v. WHIPPLE.

A variance between the writ and declaration cannot be taken advantage of by demurrer to the declaration.

In a case of such variance the writ may, on payment of costs, &c., be amended so as to conform to the declaration.

ERROR TO JACKSON DISTRICT COURT.

Opinion by GREENE, J. A summons was issued in this case against Whipple, in an action on the case on promise. A writ of attachment appears also to have been issued and executed in due form under the statute. But the declaration filed was in an action of debt. The defendant demurred to the declaration, cravedoyer of the writ of summons, and assigned as cause of demurrer the variance between the writ and declaration, in that the writ is in trespass on the case on promise, and the declaration in debt. The plaintiff, by his counsel, objected to the filing of the demurrer as inapplicable to the question therein raised. The court overruled the objection, sustained the demurrer, and gave judgment for the defendant. This decision is assigned as error, and the objection raised, that a variance between the writ and declaration cannot be taken advantage of by demurrer.

Upon a careful examination of authorities, we find but

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little difficulty in arriving at a conclusion. The recent practice in the English courts appears to be uniform, and the rule barely meets with an exception in this country, that the objection of variance between the writ and declaration "is not a ground of demurrer to the declaration, but merely of a summary application to set aside the declaration for irregularity." 1 Chit. Pl., 254. Chitty remarks that by this practice, the plaintiff may abandon his first process and issue a new writ, adapted to the form of action set forth in his declaration.

But we think it would be a more judicious practice in such cases, and authorized by our statute of jeofails, for the courts to correct such deviation, by ordering the writ to be amended at the cost of the plaintiff; or if occasioned by the clerk, in neglecting to follow the præcipe, then at his cost. And if, in the opinion of the court, such amendment occasion surprise to the defendant, a continuance of the cause should be ordered till the next term. By such a practice, we think much unnecessary inconvenience and expense would be saved to parties.

We think the court erred in acting upon and sustaining the demurrer.

Judgment reversed.

L. Clark, for plaintiff in error.

Wilson and Smith, for defendant.



STEINHELBER v. EDWARDS.

Under the statute the signature of the indorser of a note need not be proved, unless it is denied under oath.

ERROR TO SCOTT DISTRICT COURT.

Opinion by GREENE, J. Appeal from a justice of the peace to the district court. The suit was commenced by

M. Edwards against Ezekiel Steinhelber, on a promissory note made by him to Jacob Berger, and indorsed by Berger to Edwards. By the decision of the justice, the plaintiff below was not permitted to recover, and he thereupon appealed to the district court, where the defendant objected to the admissibility of the note as evidence, without proof of the assignor's signature. The objection was overruled. This ruling is now urged as error, and raises the only point in the case which has not been heretofore adjudicated by this court. In support of this decision, reference is made to the statute regulating promissory notes, &c. Rev. Stat., 455, § 10. That section provides, that "the signature to all bills, promissory notes, bonds or other instruments, or to any assignments thereon, on which suit is or may be commenced in any of the courts of this territory (state), shall be considered *prima facie* evidence of their execution, and the party denying the same, his agent or attorney, shall deny the same by oath, when the party introducing the instrument shall prove the signature by extrinsic evidence: *Provided*, If the defendant fails to appear at the first term of the court, the plaintiff, in order to obtain a judgment against him at that term, must prove the execution and assignment of the note, bond or other instrument." It is contended that this section does not extend to the signature of a party who transfers a note by indorsement. But we think it is obviously shown by the comprehensive letter of the section, that the legislature intended to comprise all such indorsements under that remedial exemption from extrinsic proof. It extends to the signature of any assignments on the note. It is not limited to any particular class or kind of assignment, but applies indiscriminately to all, whether made in express terms or by necessary implication of law. The proviso of the section as explanatory of what precedes it, shows that after the appearance term, it is not necessary to prove either the execution or the assignment of the note. The word "assignment" in connection with those of "any assignments," in the second line of the section, manifestly extends in its

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signification to an indorsement or transfer of the instruments designated. Any other construction would not, we think, be consistent with the object of the legislature in superseding unnecessary proof, where the signature is not denied under oath. We conclude, then, that the court below very properly admitted the note in evidence.

Judgment affirmed.

E. Cook, for plaintiff in error.

P. Smith, for defendant.



McMULLAN *et al.* v. MACKENZIE.

The existence of a partnership is a question of fact to be determined by the jury, who are alone authorized to decide upon the weight and sufficiency of the testimony adduced to establish the fact.

The fact that the defendants conducted a smithing business together is *prima facie* evidence of a co-partnership.

Where a note is given in the name of a firm, it is presumptive evidence that it was given for a consideration furnished to the co-partnership, and the *onus probandi* lies upon the party seeking to avoid the note, to show that it was given for some other purpose.

ERROR TO CLAYTON DISTRICT COURT.

Opinion by GREENE, J. This action was commenced in assumpsit by Donald Mackenzie against Patten McMullan and Glendower M. Price, on promissory notes executed by Patten McMullan & Co. Verdict and judgment against the defendants in the courts below for the sum of \$1022.50.

We are informed by the bill of exceptions, that on the trial of the cause the plaintiff proved by two witnesses that the defendants had carried on a smithing business together; and by one witness, that both of the defendants acknowledged, prior to date of note, that they were doing that

business together. No other proof of partnership having been adduced, the defendants requested the court to instruct the jury that the evidence was insufficient. But the court refused to give the instruction, and thereupon charged the jury that the fact that they had done a smelting business together was *prima facie* evidence of a partnership. The defendants excepted to this ruling of the court as error.

1. The question arises, Did the court err in refusing the instruction as asked? We think not. If the evidence was even insufficient, it was not within the province of the court to decide the question. The existence of the partnership was a question of fact for the determination of the jury, and they alone were authorized to decide upon the weight and sufficiency of the testimony to establish that fact. Had the evidence been in relation to one of the defendants only, it would have been defective in law, for if it did not affect or implicate both of them, it would have been no proof of the partnership. In that event the court might have given the instruction as asked, because the evidence would have been insufficient in law. But in this case the evidence extended to both parties, and was therefore legally admitted to the determination of the jury as to its sufficiency in fact, to establish a partnership between them.

2. It is contended that the court erred in giving the instruction that the fact of their having conducted the smelting business together would amount to *prima facie* evidence of the co-partnership. This instruction would have been more consonant with our statute and the practice of our courts if given in more qualified terms, in relation to the fact of their being together in that business. But still the charge does not assume that fact to be proved. It remained an open question to be determined by the jury. The instruction virtually directed them that if they concluded that fact to be established, it would amount to *prima facie* evidence of a partnership. The question then follows, Is that a correct conclusion in law? Would such

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joint business transactions amount to *prima facie* evidence of partnership, and place the *onus* of disproving it upon the defendants? Under our statute, in order to recover on a note executed by an association of individuals, it is only necessary to adduce proof sufficient to show their partnership, name, and style. Rev. Stat., 454, § 9. This fact is sufficiently proven by adducing the note to show in what style they executed it, with the additional proof that at or about the time of its execution they were doing business together as partners. Besides, our statute considers the signatures to all promissory notes as “*prima facie* evidence of their execution,” and the party denying the same is required to do so under oath. Rev. Stat., p. 455, § 10. In this case the defendants below did not so deny the execution of the note, nor did either of them deny being a party thereto. This state of facts under our statute affords strong presumption of the existence and style of the co-partnership, and should not, we think, require as strong *prima facie* proof as would be necessary in the absence of such statutory provisions. But upon general principles it is well settled at this day, that in order to charge partners, strictness of proof of the partnership is not necessary. Collyer on Partnership, § 769. Upon this point Greenleaf remarks that “the facts being less known to the plaintiff, it is sufficient for him to prove that they (the defendants) have acted as partners, and by their habit and course of dealings, conduct and declarations, they have induced those with whom they have dealt to consider them as partners.” Greenl. Ev., § 483. Hence, says Collyer, if it appear that two persons have in many instances traded jointly, that will be *prima facie* evidence of a general partnership. Col. on Part., § 769.

In *Forbes v. Davidson*, 11 Vt., 660, where the plaintiffs proved that they conducted business publicly as partners, it was held to be *prima facie* evidence that they were such, as well between themselves as to third persons. If such proof amounts to *prima facie* evidence of a partnership in behalf of plaintiffs, in whom more strictness of

proof is required, it must more obviously amount to such evidence in its application to defendants.

Under these authorities and those sections of statute to which we have referred, we think the charge of the court was substantially correct:

But it is contended that in order to attach liability to Price, who is not named in the note, there should be some proof to show that it was given for something connected with the business of smelting, in which the defendants were jointly engaged. This point is not properly raised upon the record in the case, but as it appears to have been somewhat relied upon by counsel, we will decide upon it.

The fact that the note was given in the name of the firm is of itself presumptive evidence that it was given for a valuable consideration furnished to the co-partnership, and the *onus probandi* lies upon the party seeking to avoid the note, to show that it was given for things not relating to or affecting the partnership. Had the party objected that the note was given in payment of the individual debt of his co-partner, or for money which had never been brought into the partnership business, he should have proved the fact. In this case there was no such objection raised, or proof adduced.

Both in legal and commercial contemplation, the note of a firm is deemed *prima facie* to have been given in the fair and legitimate course of the partnership business. *Doty v. Bates*, 11 John., 544. In *Whitaker v. Brown*, 16 Wend., 507, the principle is broadly asserted by Chancellor Walworth, that a note given by one partner in the name of the firm, is of itself presumptive evidence of the existence of a partnership debt, as each partner has a general authority to contract liabilities in the transactions of the firm. Thus viewing the points raised in this case, we can see no error in the proceedings of the district court.

Judgment affirmed.

P. Smith, for plaintiffs in error.

T. Davis, for defendant.

Fulweiler v. Singer.

FULWEILER v. SINGER.

Pleas, averring that one of two payees of a note, became bankrupt after the note was made and before it was indorsed to the plaintiff, are defective, unless they aver that the party who indorsed the note was not authorized to do so; that the note was or should have been set forth in the bankrupt's inventory of assets; and that the note was so held as to be vested by virtue of the decree, in the assignee of the bankrupt, or that he otherwise acquired an interest or control over the note.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by GREENE, J. Enion Singer sued Abraham Fulweiler in assumpsit, on a promissory note executed August 6, 1838, and made payable to Singer and Coust, and by them indorsed to the plaintiff. The defendant pleaded non-assumpsit in the usual form, and several special pleas averring in general terms: 1. That Coust, the assignee of said note, became a bankrupt after it was made, and before it was assigned to the plaintiff; 2. That he became a bankrupt in Ohio, August 19, 1841; and 3. By an amended plea, that said Coust became such bankrupt according to the true intent and meaning of an act of Congress, passed August 19, 1841, and that he was so declared by the district court of the United States for the state of Ohio, and that said court appointed an assignee for the said Coust, who was entitled to said note at the time it was assigned to the plaintiff. A demurrer to the three special pleas was sustained. The case was then submitted to the court upon the general issue, and judgment rendered upon the note in favor of the plaintiff.

It is now contended, that the court erred in sustaining the demurrer to the three special pleas. In this we can see no error, as those pleas appear to be defective, not only in form, but in substance. Upon the face of the papers the note appears to have been regularly indorsed to the present holder, and there is no specific allegation in either plea that the indorsement was not made by a party duly authorized to assign the same; they contain no aver-

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ment that the note, or the bankrupt's interest in the note, was or should have been set forth in his inventory of property rights and credits; nor that the note was so held as to be vested by force of the decree, and by operation of law, in the assignee of such bankrupt, or that he otherwise acquired any legal interest or control over the note before the indorsement; nor does either of said pleas give the name of the assignee in bankruptcy. In these particulars we cannot but regard the pleas as substantially defective, and therefore conclude that the demurrer was properly sustained by the court below.

Judgment affirmed.

Wilson and Smith, for plaintiff in error.

Davis and Bissell, for defendant.



STRAWSER v. JOHNSON.

A general plea that a note was obtained by fraud and circumvention is good.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by GREENE, J. This was an action of assumpsit commenced by William L. Johnson against George Strawser, on two promissory notes. Among other things, the defendant pleaded that the notes were obtained from him by fraud and circumvention. A demurrer to this plea was sustained by the court below, and this ruling is the only question presented for adjudication.

It has already been determined by this court that a general plea of fraud, under our statute, in an action on a promissory note is good; *Hildreth v. Tomlinson*, ante, 360; *Hampton v. Pearce*, Morris, 489. No good reason has been urged for departing from a practice which has

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been uniformly recognized by this court in such actions. The charge of fraud, though general in its character, has a special application to the obtaining of the note. Although the charge is general, it is still upon an object so definite, upon a transaction so specific, that the nature of the fraud cannot be mistaken. Ordinarily it is a safer practice to make special allegations of fraud in pleadings, but in those cases where a general averment of it is made upon an act so certain and detached from other transactions as to render the subject matter of the fraud obvious, we think no good reason can be urged against the sufficiency of such averment. *Davis v. Tileston*, 6 Howard, U. S., 120; *Barber v. Kerr*, 3 Barb., 149. The reason for this rule is, we think, alike applicable to law and equity pleading.

Judgment reversed.

Wilson and Smith, for plaintiff in error.

B. M. Samuels and Wm. Y. Lovell, for defendant.

CHAPMAN v. MORGAN *et al.*

The action of trespass *quare clausum fregit* is local, and can only be entertained by a justice of the county in which the land is situated.

Appearance will not confer jurisdiction over parties not residing within the jurisdiction of the court, nor subject to its process.

Consent of a party cannot confer a greater authority upon a court than the law affords.

The district courts have jurisdiction over all civil and criminal matters arising in their respective districts.

AGREED CASE FROM CLINTON DISTRICT COURT.

Opinion by GREENE, J. Trespass *quare clausum fregit* commenced before a justice of the peace of Clinton county, against Morgan and Hall, who were, when the trespass was

committed and the suit commenced, residents of Scott county. After a trial before the justice the case was taken to the district court by appeal, and was on motion dismissed, because the justice had no jurisdiction over the defendants as citizens of another county.

As an objection to the decision, it is contended that this is a local action, and should have been commenced in the county where the land is situated. The correctness of this position will not be controverted, nor would the right of a justice of the peace to try in such an action defendants who are householders and reside without the county, if served with process within its limits, be questioned, if the statute did not expressly provide to the contrary. It provides "that in no case shall any civil action, other than by attachment, against any defendant who is a householder in this state, be commenced in any county other than the one in which such defendant resides." Laws of 1847, p. 90, § 6. This statute obviously limits the jurisdiction of justices in such suits to defendants who are citizens of the county in which the justice is authorized to act, and deprives him of all authority over non-resident citizens. But it is contended that by appearing and going to trial, the defendants waived all objection to the want of jurisdiction in the justice. If there had been any defect or irregularity in the process, and service, or any other method provided by law for bringing the parties into court, that defect might have been waived by appearance, but when no process, however regularly executed, can bring a party under the authority of the court, the appearance of the defendants cannot confer the authority. In a case like the present, where a justice is excluded by positive enactment from the exercise of jurisdiction, it cannot be conferred by an implied agreement, inferred from the appearance of the parties. Such appearance will not confer jurisdiction when it could not be exercised by process. As a general rule, consent cannot confer upon courts a greater power than the law affords. Parties cannot by agreement give jurisdiction to a court which could not be exercised by

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virtue of legal process. The authorities upon this point are uniform. Although this doctrine is ordinarily confined to the subject matter of a suit, we think it may with great propriety be applied to parties when they are by statute excluded from the cognizance of the court, as in this case.

The position assumed by counsel, that the plaintiff would be remediless if this action could not be entertained before a justice of the peace, is not correct. He was clearly entitled to his action in the district court. Under the constitution, the district courts "have jurisdiction in all civil and criminal matters arising in their respective districts." All statutes to the contrary must necessarily yield to this paramount law. Hence the general jurisdiction which the district court possesses over all civil matters must necessarily include a full concurrent jurisdiction with justices of the peace. It therefore follows that the present action might have been entertained by that court, and as the statutory limitation in relation to non-resident defendants only attaches to justices' courts, that difficulty would have been removed. We conclude, then, that the court below did not err in dismissing the appeal.

Judgment affirmed.

W. E. Leffingwell, for plaintiff in error.

P. Smith, for defendants.



SHAW v. GORDON.

In an action of unlawful detainer, a complaint is good which contains all the averments of facts required by statute.

After a verdict and judgment have been rendered, without objection to the complaint, a court should not entertain merely formal defects.

ERROR TO JACKSON DISTRICT COURT.

Opinion by GREENE, J. Shaw filed his written complaint before a justice of the peace, in an action of unlawful detainer. The defendant appeared and submitted to trial without objection to the form of the complaint. Verdict and judgment for the plaintiff. The defendant appealed to the district court, and there moved to quash the proceedings, on the ground that the complaint does not show a cause of action cognizable before a justice of the peace. This motion was sustained by the court, and the suit dismissed at the cost of plaintiff.

The only question submitted to our determination is, Did the court below err in dismissing the suit? The decision of this question must be predicated exclusively upon the sufficiency of the complaint under our statute.

The complaint substantially avers John Shaw to be lawfully seized in fee of the land therein described; that he is justly entitled to the possession thereof; and that said premises are now unlawfully detained from his possession by Charles Gordon, who resides thereon, and refuses to deliver up the same to complainant, although legally notified to do so. The complaint is dated June 9, 1847, and signed, "John Shaw."

Unlawful detainer is defined by Rev. Stat., 345, Art. 12, § 3. If our statute recognized no other description of the offence than that set forth in this section, then we could but determine the complaint defective. Unquestionably, to enable the plaintiff to recover, he must prove the constituents of unlawful detainer as designated by that section; but that they need not be set forth in the complaint is rendered conclusive by reference to § 6 of the same article. It provides that, "when a complaint to any justice of the peace shall be made in writing, and signed by the party aggrieved, his agent or attorney, specifying the lands, tenements, or other possessions so forcibly entered and detained, or so unlawfully detained over, and

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by whom, and when done, it shall be the duty of the justice of the peace to issue his summons," &c. This section sets forth the requisites of a complaint, in order to confer jurisdiction and power upon the justice; and when made conformable to it, we must consider it substantially good, though it should not characterize the holding over in the language descriptive of the offence in the preceding section.

By reference, it will be seen that the complaint in this case specifies all the facts required by the section which regulates it; and hence we are of opinion that the court erred in sustaining the motion to dismiss the suit.

Had the complaint been deemed insufficient in form, it was still erroneous for the court to entertain the motion at that advanced stage in the proceeding. After a verdict and judgment before the justice without objection to the complaint, the district court should not have inquired into its defective form. *Wright v. Lyle*, 4 Alabama, 112; *Hilliard v. Carr*, 6 *ib.*, 557; *Snoddy v. Watt*, 9 *ib.*, 611; *Pearce v. Swan*, 1 Scam., 268.

The position assumed by counsel for the defendant in error cannot be controverted, that courts of inferior jurisdiction must act within the scope of their authority as defined by law, and if the face of their proceedings shows that they have transcended that defined authority, they become *coram non judice*, and void; but we cannot see the application of this ever recognized principle to the question at bar. The only inquiry legitimately before us is, whether the complaint is substantially good under our statute. The questions raised in relation to the justice trying title to lands and as to his proceeding in ejectment, were not passed upon by the district court, nor are they by the record made the proper subjects for adjudication in this court. The subject matter of the complaint is by statute made cognizable before a justice, and we may assume, as the question is raised, that we can see nothing in his proceedings thereon which materially overreaches the authority conferred.

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The case of *Wells v. Hogan*, Breese R., 264, is urged with much confidence to show that the complaint before us is insufficient. Had this decision been made upon a statute like ours, defining what shall constitute the substance of the complaint, we should have had more difficulty in arriving at our present conclusion in this case. Though the statute of Illinois is substantially similar to that of Iowa in defining "unlawful detainer," still it does not in like manner direct the ingredients or material requisites of the complaint; and hence it was properly held in *Wells v. Hogan*, that the complaint should conform to the statute and set out the detainer or holding over as the same is defined by law, in order to bring the subject matter within the jurisdiction of the justice. We have already noticed that our statute authorizes the justice to entertain jurisdiction by issuing his summons, when a complaint is filed with him containing the prescribed requisites; and that the complaint before us contains at least the substantial averments required.

Judgment reversed.

P. Smith, for plaintiff in error.

L. Clark, for defendant.

SMITH v. BISSELL.

A note is *prima facie* evidence of a settlement between the parties to it, so as to exclude items of set-off charged prior to the date of the note, unless the defendant first prove, or offer to prove, that such items were not included in the settlement upon which the note was given.

A judgment cannot summarily be rendered against a surety in a case taken to the district court by *certiorari*, as it may be in cases taken up by appeal.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by GREENE, J. This action was commenced before a justice of the peace, on a promissory note made by Seneca Smith to E. M. Bissell, and a judgment rendered for the amount due on the note. Upon trial before the justice, the defendant offered to prove items of set-off, which bore date prior to that of the note. To this evidence objections were made by the plaintiff, and sustained by the justice. Assuming this ruling to be erroneous, the defendant took the case to the district court by *certiorari*, and there the decision of the justice was affirmed, and a judgment rendered against the plaintiff in error, and his surety in the *certiorari* recognizance.

It is now contended that the court erred: 1. In affirming the judgment of the justice; and 2. In rendering judgment against the surety.

Upon the first point the question is presented, Does the note amount to *prima facie* evidence of a settlement between the parties, so as to exclude items of set-off charged prior to the date of the note, unless the defendant first prove, or offer to prove, that such items were not included or satisfied in the arrangement or settlement upon which the note was given?

It is hardly consistent with the ordinary dealings between men, nor with the more systematic transactions of commercial life, to presume that a man would be likely to give his note to a person who was at the same time indebted to him. Such a presumption is not only inconsistent with the general course of business, but is repugnant to the language of the note, which acknowledges a given sum to be due from the maker to the payee. The prevailing office of a note is to show a liquidation between the parties, a settlement of mutual accounts, or an adjustment of a demand, and to create an evidence of the balance or the amount due from one party to the other. This leading and salutary object of a note would be greatly impaired.

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if it should not in all cases be adjudged at least *prima facie* evidence of the indebtedness therein expressed; and that all demands held by the payer against the payee were satisfied in the arrangement upon which the note was executed. This principle was recognized in *Gould v. Chase*, 16 John., 226, which was an action on a note dated December 28, 1813, for \$25. The defendant offered to set-off a note given by the plaintiff to one S., or bearer, for \$1.33, dated in 1810, and also a memorandum in his book of accounts, dated May 27, 1811, in which the plaintiff admitted that he was then owing the defendant the sum of \$63.48. It was held by the court that, in the absence of all explanation, the giving of the note was *prima facie* evidence that those demands had been satisfied.

In *Eaves v. Henderson*, 17 Wend., 191, a set-off was offered against the note; and in the set-off two items were included which had been delivered previous to the date of the note. It was held that evidence in relation to those two items, either as a set-off or payment, was not admissible, because a contradiction of the amount due, as expressed in the note. And it is doubted in that case, whether even an agreement to set-off precedent debts can operate as a payment, satisfaction or extinguishment of the note.

Another case in point is *Van Buren v. Wells*, 19 Wend., 203, in which a receipt for oats, dated anterior to a settlement between the parties, was pronounced to be irrelevant, as having *prima facie* been merged in the settlement. As a reason for this conclusion, the court say that the receipt was irrelevant because no evidence was offered to show that it was omitted in the settlement.

Influenced by the foregoing views and authorities, we conclude that the note in the case at bar was presumptive evidence of a settlement between the parties, which included the items of set-off dated anterior to the note, and that evidence in relation to those items was *prima facie* irrelevant, and therefore inadmissible. The defendant might have rendered proof of those items relevant, by proposing to show that they were not included in the settle-

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ment. A fact so isolated and detached from a legitimate set-off, can only become admissible by proving, or proposing to prove, some additional fact showing the legal connection and relevancy of that which is offered. The principle appears to be well supported by authorities, that evidence apparently irrelevant to the matter in issue may be lawfully rejected, unless the party offering it show how it can be made relevant by reference to facts already in evidence, or which he proposes to establish by evidence to be adduced. *People v. Gemmg*, 11 Wend., 21; *Van Buren v. Wells*, 19 *ib.*, 203, 205; *Winlock v. Hardy*, 4 Litt., 272; *Harris v. Payne*, 5 *ib.*, 105, 108; *Clark v. Beach*, 6 Conn., 142; *Crenshaw v. Davenport*, 6 Ala., 390, 392; *Tuggle v. Barclay*, *ib.*, 407, 410; *Weidler v. Farmers' Bank*, 11 Serg. & Rawle, 134, 139, 140.

From these authorities, the conclusion necessarily follows, that in *nisi prius* practice, if evidence appears to be irrelevant at the time it is offered, it is not error to reject it merely because other evidence might be given in course of the trial, by which both connected might become relevant. Still a court may let in such proof in the first instance; and if, after all is heard, it has no tendency to prove the issue, it may be excluded. But it appears to be the better practice, and sanctioned by high authority, to repudiate the irrelevant testimony in the first instance, unless the party who offers it proposes to prove other facts at the proper time, which would render the evidence of all the facts admissible to support the issue.

We think, then, that the court below very correctly affirmed the decision of the justice, and properly rendered judgment against the plaintiff in error.

2. But the court obviously went too far in entering judgment against the surety in the *certiorari* bond. A proceeding so summary and extraordinary can only be authorized by express statutory provision. Although this practice is provided for in appeal cases, (Rev. Stat., 336, § 16,) it is not authorized against sureties in those cases which are removed to the district court by *certiorari*.

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The judgment of the court below, so far as it affects the surety, will therefore be reversed, but in all other particulars affirmed at the cost of the defendant in error.

P. Smith, for plaintiff in error.

L. Clark, for defendant.

RIGGS v. BAGLEY.

In a writ under seal, the seal should be named or referred to in the attestation.

ERROR TO JACKSON DISTRICT COURT.

Opinion by GREENE, J. This case was commenced in the district court, and on motion the writ was quashed on the ground of having been insufficiently attested.

The objection presented to the writ consists in the fact that there is no reference in it, or in its attestation, to the seal of the court. It concludes in these words:—

“Witness, Frederick Scarborough, clerk of our said court at Belleview, this 3d day of May, A.D. 1849.

(Attest)

FRED. SCARBOROUGH,

Clerk of District Court, Jackson Co., Iowa.”

The seal of the court, without being in any way named or referred to, is impressed upon a corner of the writ.

It is contended that the court erred in thus quashing the writ, and dismissing the suit; that as courts of general jurisdiction are bound to know and recognize their own seals by the impression from them, there is no necessity for naming or referring to them in any portion of the instrument to which they are attached.

The defect in the writ may be regarded as technical, merely formal; as one which might properly have been conditionally amended on motion in the court below; but

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still it is a defect, an omission in the established form of a writ, which should not be overlooked.

There is perhaps no form of judicial proceeding that can be traced to greater antiquity than that of referring to the seal in the attestation of sealed instruments. And this form has continuously prevailed, especially in authenticating all public precepts and judicial process under seal.

We are not tenacious to this form, merely because it bears a vestige of olden times, nor merely because it is generally recognized by courts of record; but we adhere to it especially because it contains marks of propriety and utility.

It is true, as is urged, that the seal of the district court proves itself, but it does not of itself prove that it was affixed by the proper officer, or by authority. The clerk is the keeper of the seal; he alone is authorized to use it; and upon affixing the seal officially to any process, he should attest the fact over his own signature.

There is, we conclude, a propriety in this form of attestation, because it uniformly prevails, and is looked for in every genuine writ; and there is a utility in it, because it is one of the safeguards against surreptitious authentications.

Ministerial officers of courts are too much inclined to depart from established forms and fixed rules. Innovation is not within the province of their duties, nor can they be justified by us in any deviation from forms well known, and regulations long defined.

Judgment affirmed.

Wilson and Smith, for plaintiff in error.

Lovell and Samuels, for defendant.

Corriell v. Doolittle.

CORRIELL v. DOOLITTLE.

In a suit commenced by attachment a general judgment was rendered, and upon it a special execution issued, on which the property attached was sold; held that the sale was valid.

Where a judgment has been assigned, it is not necessary to make the assignee a party by *scire facias*, to enable him to sue out an execution in the name of the party who recovered judgment.

Where a sheriff's return of an execution sale does not show that notice of the sale was served upon execution defendant, it will not be presumed that notice was not given.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by GREENE, J. Ejectment by Curtis M. Doolittle against W. W. Corriell, for lot 90 in the city of Dubuque. Plea of not guilty. Trial by the court, and judgment for the plaintiff.

Upon the trial, the plaintiff offered in evidence the record of a judgment rendered in the district court of Dubuque county, November 18, 1841, against said Corriell in favor of Andrew Keesecker, for the sum of \$493.92. Also a special execution and sheriff's deed showing a sale to him of the lot in question, under said judgment, on the 4th day of January, 1845. In connection with this evidence the following facts were admitted:—1. That the judgment had been assigned by Keesecker to Doolittle before the execution was issued; 2. That the sheriff's returns on the execution were regular, with the exception that they did not state that the sheriff gave notice in writing to the defendant in execution, or leave such notice at his last usual place of abode, as required by Rev. Stat., p. 633, § 9; 3. That the defendant was in possession of the premises at the commencement of the suit. The case having been by agreement submitted to the decision of the judge, without the intervention of a jury, the defendant objected that the evidence was not sufficient to entitle the plaintiff to recover, but the court decided otherwise, and rendered judgment accordingly in favor of the defendant in error.

Corriell v. Doolittle.

Three points are urged in this court to show that the decision below was erroneous.

1. That the judgment was general upon which the sale was made, and a special execution issued thereon. By the record it appears that the suit upon which the judgment was rendered had been commenced by attachment, and that although the court rendered a general judgment, the execution was issued pursuant to the writ of attachment. To have been strictly regular and formal, the judgment should have ordered a special execution upon the property attached. But that omission in the form of the judgment could not vacate the attachment lien. It ran conjointly into the judgment and execution from the date of the attachment levy, and we think the special execution was fully authorized by that levy and the resulting lien, even without the special order in the judgment. Again, it was one of those irregularities in form which might have been at any time corrected *nunc pro tunc*. The record in the case affords ample data for such correction, had the objection been urged at the proper time, on motion to set aside the execution or levy thereon, and hence we cannot regard it as one of those substantive defects which can invalidate a title acquired under a judicial sale. It was not a defect which could result in any inconvenience or injury to the execution defendant, and therefore the objection should not prevail.

The form of the execution is unexceptionable. Upon its face it conferred complete authority for the sale. It recites the original attachment and levy; describes with precision the judgment upon which it issued, and directs a sale of the property attached. So far then from being a void execution, we cannot regard it as even voidable, for it clearly shows and follows the judgment upon which it was founded. The order to sell special property is not only authorized by the nature of the proceedings, but also by the general and unlimited order that an execution should issue. This authority for a general execution necessarily includes a warrant for one of a more limited

or special character, as the minor warrant is obviously comprised under the greater.

2. That Doolittle ought to have been made a party to the record by *scire facias* before the execution was issued, because he was the only person beneficially interested in the judgment. We can see no necessity or propriety for such a proceeding. The mere assignment of a judgment can have no tendency to impair the liability of the judgment debtor, nor the right of the creditor to an execution in the name of the party for whom the judgment was rendered. The only change that an assignment can effect is, to substitute the assignee as recipient of the money paid in satisfaction of the judgment. The assignment can effect no change in the parties to the execution. It could only issue in the name of the party who recovered the judgment, for if otherwise issued, the execution would not be following the judgment, and could not therefore be warranted by it. In *Hamilton v. Lyman*, 9 Mass., 14, it was held that where one of two or more judgment creditors dies after judgment and before execution, that the execution should issue in the name of all the creditors, and that the survivors should not be put to their *scire facias*. Indeed, this resort to a *scire facias* appears to be necessary only to revive an execution lost by lapse of time, or where the execution is to issue in the name of a person not a party to the record, occasioned by the *marriage*, *bankruptcy*, or *death* of the original party, so as to substitute the representative of such party as a privy to the judgment; but no authority has been produced in support of this practice in a case like the present. Such a proceeding would occasion unnecessary delay, expense and inconvenience, without any resulting benefit or security to execution defendants.

3. That the sheriff did not state in his execution returns that he gave notice in writing to the defendant as required by the "valuation law." Rev. Stat., p. 633, § 9. Section 8 of that act provides, "that any sheriff or other officer

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levying an execution upon any real estate shall, previous to offering the same for sale, give at least four weeks' notice of the time and place of such sale, by posting up written advertisements thereof in four of the most public places in the county in which such real estate may be situated." The next section, after pointing out the duties of the officer in cases where the property taken and sold on execution should not sell for a sum sufficient to satisfy the debt, &c., provides that he should "make returns of his doings thereon as in other cases; and in all cases, in addition to the above notifications of such sales, the officer shall give notice in writing to the defendant in execution, or leave such notice at his last or usual place of abode." It is admitted that the returns of the sheriff were full and perfect in every particular, except in relation to the above written notice upon the defendant. This special notice was required in all cases, and without it the sale of property belonging to an execution defendant residing within the state would be considered at least irregular, and as between original parties to the judgment and execution, would doubtless be deemed sufficient to invalidate the sale. But the validity of a sale under such an irregularity need not be considered in the present case, either as to the original judgment creditor, or as to his assignee, nor yet as to third parties; for we cannot, in the absence of proof, take it for granted that legal notice was not given. The mere silence of the sheriff's returns in relation to that special notice cannot create a legal presumption against any party that it was not regularly given. But it is contended that it should expressly appear by the returns that the officer gave this notice. The returns would have been more complete if that fact had been stated in them; still we cannot regard the omission as an irregularity which can impair the validity of the sale. *Humphreys v. Beeson*, 1 G. Greene, 199, 214.

While the statute directs the officer to make return of his doings in other particulars, it gives no such direction

in relation to this special notice. Hence it cannot be considered as the omission of even a directory duty under the statute.

The principle is generally asserted in the books, that the validity of a judgment sale does not depend upon the regularity of the sheriff's returns; and that principle has been fully adopted by this court. *Humphreys v. Beeson*, 1 G. Greene, 195, 215; *Hopping v. Burnam*, ante, 39.

We conclude, then, that no irregularities are disclosed in this case which can be considered sufficient to impeach the judgment title upon which the defendant in error recovered in the court below.

In arriving at this conclusion we freely acquiesce in the position assumed by counsel for the plaintiff in error, that when the party for whose benefit the execution was issued becomes the purchaser, he should be held accountable for irregularities which would not effect a *bona fide* sale to a third party. But we think that the irregularities complained of in this case should not prove available even against the original judgment creditor, had he purchased the land.

Judgment affirmed.

P. Smith, for plaintiff in error.

S. Hempstead, for defendant.

CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT OF THE STATE OF IOWA,
BURLINGTON, MAY TERM, A.D. 1850,

In the Fourth Year of the State.

Present:

HON. JOSEPH WILLIAMS, *Chief Justice.*
HON. JOHN F. KINNEY, }
HON. GEO. GREENE, } *Judges.*

SPRINGER v. STEWART.

In an action upon an agreement with mutual and dependent conditions, the plaintiff to sustain his demand must account for all he undertook under the agreement, and the defendant, to sustain his set-off, must establish each item of his demand by proof.

ERROR TO LEE DISTRICT COURT.

Opinion by KINNEY, J. Springer & Co. sued Stewart in an action of assumpsit on an account for work and labor done, in cutting and packing pork for defendant.

To this demand defendant pleaded a set-off, claiming damages against plaintiff for the value of a large number of hogs delivered by divers persons for Stewart to Springer, and not accounted for by said Springer, and for the value of a large amount of the pork cut and packed by Springer,

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but never delivered by him to Stewart as per contract, and for not accounting for a large quantity of lard made by Springer from the hogs cut and packed, &c.

Upon the trial, the defendant, in order to sustain his set-off, introduced to the jury the following agreement: "Article of agreement between M. D. Springer & Co. of the first part, and Pickering & Carly, of the second. Springer & Co. agree to pack from one to three thousand hogs for said Pickering & Carly, as follows: The lard rendered and packed in barrels, marked and weighed, the pork packed in barrels or bulked, as shall be directed. All to be delivered at the landing of Springer & Co. The work to be done in a workman-like manner, for which the said Pickering & Carly agree to pay said Springer & Co. 16 cents from the scales. The said Pickering & Carly to furnish salt and barrels, delivered at the aforesaid landing," &c.

From the bill of exceptions it appears that this instrument was adopted as the contract and basis of the operations between the parties to this suit, and that they were governed by it in their dealings in respect to the hogs, pork and salt mentioned in defendant's set-off. The testimony as set forth in the bill of exceptions proved that hogs had been delivered by defendant below at the landing of said Springer, in pursuance of the terms of this contract, and that said salt had also been delivered for the purpose of salting said pork. The court instructed the jury that it devolved upon the defendant to show how much pork and salt were delivered to plaintiff, and the plaintiff to show that he accounted for such pork and salt at the landing of Springer & Co., when called for by the defendant in accordance with the contract, and that if defendant or his agent would not permit either by acts or words the plaintiff to account for said salt and pork at the landing where he desired to do so, it devolved upon defendant to show the loss which he had sustained. It appears that this last instruction was given in reference to testimony showing that when defendant by his agent

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went to the landing of said Springer & Co. to take away the pork when it was cured, that plaintiff proposed to show the exact amount of said pork when he delivered it to the agent of said defendant, but that said agent rejected said proposal, and took said pork without ascertaining the quantity which he then received.

To these instructions the plaintiff excepted. The instructions of the court being based upon the contract between the parties, it only becomes necessary to ascertain whether the construction given to the contract by the court was a proper one.

By the agreement as adopted by the parties, Springer & Co. agreed to pack from one to three thousand hogs for Stewart, to render the lard, &c., and deliver the same at his, Springer's landing. For this Stewart was to pay a certain price and furnish salt and barrels at said landing. For the work performed under this contract, Springer brought his suit. Stewart pleaded the general issue, and gave notice of a set-off, claiming a balance due him for hogs, salt and lard which had never been accounted for to said Stewart by Springer. By the terms of the contract, each party was under obligations to perform certain specified duties. The conditions of the agreement were mutual and dependent. Stewart was to furnish the hogs, barrels, salt, &c., and Springer to pack the pork, render the lard, &c., and deliver them at his landing.

In order to entitle Stewart to sustain his set-off, it was incumbent upon him to prove how much pork and salt were delivered, and also upon Springer, before he was entitled to recover, to show that he accounted for the pork, salt and lard. We do not see that any other reasonable construction can be placed upon the contract between the parties, and therefore are of the opinion that the instructions by the court were correctly given.

Judgment affirmed.

J. H. Cowles, for plaintiff in error.

W. J. Cochran, for defendant.

Olive v. Daugherty.

OLIVE v. DAUGHERTY.

In an action of right, the jury returned a verdict, "We find the plaintiff entitled to no part of lot, &c., at this time, but is entitled to \$32.50 damages; and that the defendant is entitled to and took possession of the lot under color of title;" held that on such a verdict a judgment might be rendered, and that the plaintiff might recover upon a less title than that set forth in the declaration.

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. An action of right commenced by James Daugherty v. John Olive. Declaration and plea were drawn up in the form provided by statute.

The case was submitted to a jury, who returned a verdict in the following words: "We, the jury, find the plaintiff entitled to no part of lot No. 11, in block No. 26, in the town of Keokuk, Lee Co., Iowa, at this time; but is entitled to \$32.50 damages, and that the defendant is entitled to, and took possession of the lot under color of title." This verdict appears to have been delivered, and a judgment thereon rendered, without any exceptions being taken.

It is now objected that the verdict could not justify any judgment against the defendant below, that the plaintiff could not recover upon a mere lease or demise, nor upon any title less than that set forth in the declaration.

We think, however, that the statute, to allow and regulate the action of right, furnishes no ground for those objections. The twenty-fourth section clearly justifies the judgment in this case. It provides, that if the interest of the plaintiff in the property sued for expire before the day of trial, the verdict for the plaintiff shall be only for his damages, and that judgment shall be rendered accordingly. Rev. Stat., 529.

The above section appears to have been framed with a particular reference to cases like the present. It obviously assumes that a recovery may be had upon a mere lease or demise, and upon a less title than is averred by the gene-

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ral form of declaration furnished by the act. It would be a new feature in judicial proceedings to require a plaintiff to prove and obtain a verdict for all he may claim in his declaration, before he could be entitled to a judgment. Although he cannot recover more, it is a universal rule that he may recover less than he demands.

Another reason why the proceedings below should not be disturbed is, that no exception was taken at the trial. All appears to have been silently acquiesced in, and therefore, unless the record disclosed palpable error or injustice, it would be improper to reverse the judgment. Giving to the verdict in this case that reasonable intentment which courts of justice should always encourage, we must conclude that it was authorized by the pleadings, and that the judgment was conformable to the statute.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

Geo. C. Dixon and *S. M. Powers*, for defendant.



JAMISON v. REID.

In an application to the supreme court for mandamus on the district judge, affidavits were filed to show that certain facts were proved to the court below which were not certified in the bill of exceptions; to these counter affidavits were filed; held that in a matter thus susceptible of proof, and within the knowledge and sound discretion of the court below, this court will not interfere by mandamus.

ERROR TO LEE DISTRICT COURT.

Opinion by WILLIAMS, C. J. This case and three others—viz., *Joseph Taylor v. Hugh T. Reid*; *Harlow Barney v. same*; *James Sprott v. same*—are here upon writ of error. The attorney for plaintiffs in error in the several cases moves the court as follows, viz. :—

Jamison v. Reid.

“And now comes James Jamison plaintiff in error, by Dixon his attorney, and asks the court for further time to assign errors, and upon return of a certain transcript mentioned in the affidavit, filed in this cause, for an alternative mandamus directed to the Hon. Geo. H. Williams, district judge of Lee county, to correct the bill of exceptions filed in this cause, or show cause upon the affidavit and papers made a part thereof, filed in this cause.”

By consent, the decision of the question arising upon the motion in this case, being the same as that in the other three, is to apply to them all.

The gravamen of the motion is laid by the affidavits of G. C. Dixon and Philip Veile, Esq. The first states on oath, that on the trial in the court below, among other things, the defendant Jamison offered in evidence an alias *fi. fa.* upon a judgment or decree for costs in the partition suit of the half-breed tract, rendered in 1841, against Augustus Gonville, and under a sale, upon which *fi. fa.* Reid, the plaintiff in this suit, claimed title. That defendant also proved by said Veile, that said Augustus Gonville died in 1844; and that said defendant offered to prove that said Gonville died before the issuing and test of the said alias *fi. fa.*; but that Reid, the plaintiff, objected to such evidence, and the objection was sustained by the court, the evidence excluded, and defendant excepted. The affidavit states that the cause was tried at the November term of Lee county district court, 1849, at the latter part of the term; that for want of time, by agreement of the parties, the bills of exceptions were not drawn up until after the adjournment of the court. That the exceptions were settled by the judge in vacation. That he, affiant, had no opportunity to have said bills of exceptions corrected until the April term of said court.

Philip Veile, judge of probate, states in his affidavit, that he was sworn as a witness in the cause, and stated in evidence, that the records of the probate court showed that Gonville died in March 1844.

It appears that at the April term of the Lee county dis-

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trict court afterward, application was made to the district judge to correct or alter the bills of exceptions as to the matters here alleged; and the parties were heard on the motion; and that the court then refused the motion, and the bills were left standing as they were at first drawn.

The defendant in error, Reid, filed his affidavit contradictory to that upon which the motion is based, and affirming the evidence as offered to be the same as stated in the bill of exceptions, so far as the same related to the time of Gonville's death.

It appears that the attorneys and parties could not agree upon the evidence as offered, and that the proof as to what it had been was contradictory. It is to be presumed that the judge certified the bill of exceptions, then, truthfully, so far as he could, stating the fact as he understood it to be.

In a matter of this kind, being of fact, transpiring on trial, susceptible of proof in the way pointed out by the statute, or within the peculiar knowledge of the judge below, and submitted to him by the consent of the parties, this court will not interfere by its supervising and correcting power, by *mandamus*.

This court is not called on to compel the judge to perform a legal and proper act required of him, but to dictate what shall be done by him in performing that act. We cannot thus be called on, sitting as an appellate supervisory court, to hear and determine the facts on which the adjudication of this question would depend.

The means of enforcing the signing and sealing of the bill of exceptions, as asked for by the plaintiff in error, and as prescribed by statute, were waived.

The practice act, Rev. Stat., p. 472, § 19, provides for the taking "exceptions to the opinion of the court *during the progress of the trial, in writing*"; which, when thus taken, it is "the duty of the judge to allow and sign and seal. But if the judge refuse to allow or sign such bill when tendered, then it may be signed by bystanders or attorneys of the court, and if the judge refuse to permit

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the bill to become a part of the case, upon affidavit of such refusal, the supreme court may admit such bill of exceptions as a part of the record. The legislature here have provided a legal remedy for the neglect or refusal of the judge to sign and seal the bill of exceptions, if it be tendered at the proper time. We admit that the practice of deferring the taking of the bill, not having it signed by the judge until after the trial is concluded, has prevailed in the courts of this state. When this is done, the judge necessarily must trust to his notes or to his memory for the facts to be certified in the bill of exceptions, should there be a disagreement between the parties or their attorneys as to the facts. Good grounds are not shown for a mandamus in this case. The statute affords an adequate and ample remedy to the party taking exceptions, when the judge refuses to properly certify the bill of exceptions. *United States v. Dubuque Co.*, Morris, 31; *Shepherd v. Wilson*, 6 How., 260.

The writ of mandamus is only properly exercised in cases of extreme necessity, where there is no adequate means at law to enforce a rightful official duty, and when the party seeking relief has not been in default.

The writ of mandamus refused.

Geo. C. Dixon, for plaintiff in error.

H. T. Reid and H. L. Reeves, for defendant.



NELSON *et al.* v. GRAY.

The district courts have concurrent jurisdiction with justices of the peace in all sums under \$100.

After the death of a party is suggested, it is error to render judgment against him.

Where a judgment is rendered upon a bond, it should be for the amount of the penalty; with an order that an execution issue only for the amount of damages proved to have been sustained by the breaches.

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ERROR TO LEE DISTRICT COURT.

Opinion by KINNEY, J. This was an action of debt commenced in the district court by Gray, for the use of Welsh, against Nelson and Dawson, upon a replevin bond executed by them jointly and severally in the penal sum of \$80. After much interlocutory pleading a trial was had, and the jury found a verdict for plaintiffs in the sum of \$42.40, and costs. A motion for a new trial was made and overruled. The plaintiffs assign the following for error:—

1st, Said bond being under \$100, said district court had no jurisdiction.

2d, That the judgment is rendered against Dawson and Nelson, the latter of whom the record shows was dead at the time of the rendition of said judgment.

3d, That the jury found a verdict of \$42.40, which is inconsistent with the declaration, \$80 being the penal sum of the bond, and the amount for which judgment in debt ought to have been rendered.

The first assignment attacks the judgment of the district court for want of jurisdiction, where the amount claimed is under \$100. The constitution provides that the district court shall be a court of law and equity, and have jurisdiction in all civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law. Art. 6, § 4. It also provides that the jurisdiction of justices of the peace shall extend to all civil cases (except cases in chancery, and cases where the title to any real estate may arise) where the amount in controversy does not exceed \$100. Art. 12, § 1. It was claimed in the argument that this last clause gave to justices of the peace *exclusive* jurisdiction to the amount limited by the constitution, and that the district court could not exercise concurrently a jurisdiction under \$100.

We think this a violent construction of the constitution.

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By the constitution, the district courts have jurisdiction in all civil and criminal matters in their respective districts. This power may be exercised in all cases where the amount claimed is under \$100, as well as in cases where the demand is over. In the former, neither court has exclusive, but each, concurrent jurisdiction. The legislature may by law regulate the practice and proceedings in the district courts, and in this way provide the mode of exercising the jurisdiction, but cannot curtail or restrict the power conferred by the constitution.

If there is an apparent conflict between the clause in relation to the jurisdiction of district courts and that of justices of the peace, each if possible should be so construed as to preserve the force and harmony of both.

As well might we say, that the jurisdiction of the district courts in all sums under \$100 is exclusive, because it extends to all civil matters, as to place that construction upon the same language in relation to the jurisdiction of justices' courts. The same reason exists for the one as the other, and hence such a construction upon either clause would be violent, unsound and erroneous. But by giving to each court a concurrent jurisdiction to the extent conferred upon justices of the peace, the harmony of these provisions of the constitution is fully preserved, and the manifest intention of the framers of the instrument declared and enforced.

But the court erred in rendering judgment against Nelson. From the record it appears that the death of Nelson was suggested, and the cause continued, for the purpose of making his administrator a party. This nowhere appears to have been done, and the verdict is returned against both defendants, and a judgment entered up against them, which, so far as the judgment against Nelson is concerned, is erroneous.

The suit being brought upon a penal bond, conditioned for the performance of covenants, the verdict, if for the plaintiff, should have been for the penalty of the bond, with an assessment of damages to the amount proved to

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have been sustained by the plaintiff by reason of the breaches thereof.

In such case the statute provides for a judgment for the penalty to stand for such other breaches as may afterwards happen.

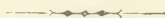
Upon a verdict by the jury upon these bonds, the clerk should issue execution only for the amount of the breaches assessed, and an order to this effect should be entered of record as a part of the judgment of the case.

In this case the penalty of the bond was \$80. The jury found a verdict for \$42.40, and judgment is rendered for the amount without regard to the penalty. As this was error, the judgment of the court will be reversed, at the costs of the defendant in error, but the error being more of form than substance, not seriously affecting the rights of the plaintiffs in error, we will not award a trial *de novo*, but direct the court to enter up a judgment in legal form against Dawson, the surviving obligor in the bond.

Judgment reversed.

J. C. Hall, for plaintiffs in error.

Geo. C. Dixon, for defendant.



THE STATE v. CADLE.

The election in August, 1848, was the second general election under the constitution.

Clerks of the district court and prosecuting attorneys should be biennially elected at the general elections.

SUBMITTED BY AGREEMENT FROM MUSCATINE DISTRICT
COURT.

Opinion by GREENE, J. This was a *quo warranto* on the information of Abraham Smalley against Richard Cadle.

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The complainant charges Cadle with unlawfully holding and exercising the office of clerk of the district court, in the county of Muscatine, to the exclusion of the relator, who claimed to have been regularly elected to the same office, on the first Monday in August, 1849, and to have executed a bond, and to have taken the oath of office as required by law, on the 25th of the same month.

In pleading to the information the defendant acknowledged that he did hold and exercise the office as charged, but denied the usurpation alleged, and the right of Smalley to the office; and he justified by averring that he was duly elected to the said office at a general election held on the first Monday in August, in the year 1848, and on the 15th of the same month qualified himself according to law, and that the term of office had not yet expired. To this plea the relator demurred, but the court overruled the demurrer, and adjudged the plea a sufficient bar to the action. In thus disposing of the demurrer the court necessarily decided that a general election, as provided by the constitution, was held on the first Monday in August, 1848, at which the defendant was elected to the office in question for the term of two years. The correctness of this decision is controverted by the plaintiff in error, and this is the only question involved in the case.

The constitution provides for the election of clerks of the district court, by the qualified voters of each county, at the general election, and that they shall hold their office for the term of two years. Laws of 1847, Art. 6, § 5, of the state constitution. By the third section of the fourth article it is provided, that "the members of the house of representatives shall be chosen every second year by the qualified electors of their respective districts, on the first Monday in August, whose term of office shall continue two years from the day of the general election." The sixth section of the schedule declared, that the first general election under the constitution should be within three months after its adoption, at such time as the governor by proclamation might appoint for the election of represent-

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atives in Congress and state officers; but the office of clerk is not enumerated in that section as one of those to be chosen at that election. Under this section of the constitution the governor appointed the first general election in October, 1846, and at that time the members of the first general assembly were elected, and clerks were chosen in a portion of the counties. As several of the clerks were chosen without legal notice of the election, an act was passed in which any person who received for clerk a majority of all the votes cast in the county for state officers, "at the general election on the 26th October, 1846," should be recognized as clerk, on giving the bond and taking the oath required by law. Laws of 1847, p. 24.

Clerks were again elected on the first Monday in August, 1847, in some of the counties, and their election was declared to be legal by an act of the general assembly, approved January 25, 1848, and by the same act subsequent elections were authorized to take place on the first Monday in August, 1849, and biennially thereafter.

But in many of the counties clerks were elected at the general election in 1848, and in December following another act was passed which repealed the act of January 25, 1848, so far as it applied to the election of prosecuting attorneys and district clerks, held on the first Monday in August, 1848. This new act also provided that those officers should be elected on the first Monday in August, 1850, and every two years thereafter in every organized county in the state. The legislation on this subject has not only been contradictory, but some of it has been repugnant to the constitution. By that instrument it is expressly established that the clerks and prosecuting attorneys shall be elected at the *general* election, and hold their offices during the term of two years, and the time designated for this general election is the first Monday in August, when the members of the general assembly are to be biennially chosen. But the *first* general election, as we have seen, was to be at such time as the territorial governor might by proclamation appoint. That time having been fixed

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in December, 1846, it necessarily follows that the next general election, as biennially designated by the constitution, was on the first Monday in August, 1848, and would occur on the same Monday in every alternate year thereafter. This, we think, is the only construction that can harmonize with the letter and spirit of the constitution, and such, we conclude, was the obvious intention of its framers. So far as public convenience can have a bearing upon this question of construction, it was no doubt promoted by the decision below. Most of the elections have been conducted conformable to that view, and with that understanding most of the election laws have been enacted. The first legislature under the constitution clearly recognized that construction, in passing an act defining the time of holding elections for state, district and county officers. Laws of 1847, p. 153. The second section of that act provides that the governor shall be elected every four years, counting from the first Monday in August, 1846; and the biennial election of secretary, auditor and treasurer of state, counts from the same date, according to the third section of the act. In section 5, after providing for the election of several county officers on the first Monday of August, 1847, and biennially thereafter, it is enacted, "that in those counties where there was no election for clerks of the district court and prosecuting attorneys at the last election, there shall be elected, on the first Monday in August next, one clerk of the district court and one prosecuting attorney, who shall hold their offices until the *general election on the first Monday in August, 1848,*" &c.; and the same act provides for the election of senators and representatives at the election of 1848, and biennially thereafter. These various sections properly considered show the contemporaneous construction placed upon the constitution by the general assembly in relation to elections; that construction has generally prevailed in practice, and has repeatedly been sanctioned by judicial decisions. So far then as public convenience can influence a decision upon a question of doubtful construction, it

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is in support of the decision made in the court below. But independent of this consideration, and without going beyond the explicit language of the constitution, we have united in the conclusions, that the general elections authorized by the constitution are biennial, and as the first general election took place in 1846, the second was held on the first Monday in August, 1848, and all subsequent ones must be held every two years thereafter; and that under the constitution the only time appointed for the election of clerks and prosecuting attorneys is at the general elections.

Judgment affirmed.

D. C. Cloud, for plaintiff in error.

W. G. Woodward, for defendant.

TRIMBLE *v.* THE STATE.

The act of the legislature creating two jury districts, and appointing two different places to hold the district court in Lee county, is not unconstitutional. Kinney J., *contra*.

In examining a juror as to his qualification, he stated that "he had formed and expressed an opinion from the rumor or report he had heard in his neighborhood, soon after the murder was committed; that he had no acquaintance with the defendant, no ill-will or prejudice against him; that he had no personal knowledge of the circumstances of the case; that he had never heard any of the testimony or conversed with any of the witnesses; that his opinion was conditional; that if what he had heard was true, he had formed an opinion, and if not true he had formed none." Held that such a juror is incompetent.

ERROR TO LEE DISTRICT COURT.

Opinion by WILLIAMS, C. J. Alexander Trimble was indicted at the September term of the district court at Keokuk, in Lee county, A.D. 1849, for the murder of Richard Wells. He was found guilty of manslaughter by

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the jury, and sentenced by the court upon the verdict to pay a fine of \$1000, to undergo confinement in the penitentiary for the term of three years, and to pay the costs of prosecution. When the cause was called for trial, the counsel for the prisoner made three challenges to the array of grand and petit jurors respectively. The challenges were overruled by the court. Having proceeded with the trial so as to call several petit jurors to the box, upon examination as to their legal qualification to sit as jurors in the case, they were challenged by the prisoner for cause. The challenge was overruled, and the jurors were sworn, and participated in making and rendering the verdict, upon which the judgment and sentence of the court were pronounced. Motions in arrest of judgment and for a new trial were made, and overruled by the court, before judgment and sentence.

The following are the principal assignments of error, which are relied on as ground of reversal:—

1. The court erred in overruling the prisoner's challenges to the array of grand and petit jurors who found the indictment and tried the cause; the venue for summoning both being illegal.

2. The court erred in not allowing defendant's challenges for cause of jurors who had each formed and expressed an opinion as to the guilt or innocence of the prisoner.

The first assignment involves the question of legal validity as to selection, summoning and qualifications of the jurors, grand and petit.

The objection involves the constitutionality of the proceeding as conflicting with the organization of the counties of the state for judicial purposes. In order to the proper disposition of this question, we will refer to the provisions of the constitution, and the acts of the legislature affecting the subject under consideration.

The act of January 24, 1848, entitled "An act fixing the times and places of holding the district courts in the first judicial district," enacts that the times and places of holding the court shall be, "In the county of Lee, at Fort

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Madison, on the first Monday in April and first Monday in November; at the city of Keokuk, in said county of Lee, on the third Monday in February and third Monday in September; *Provided*, That the authorities of the city of Keokuk shall provide, free of charge, the necessary rooms for holding court at said county (city)."

Sec. 2d provides, That "the said district courts in the county of Lee shall have concurrent jurisdiction in all civil causes in said county, except appeals from justices of the peace in the city of Keokuk, and in the townships of Jackson, Des Moines and Montrose."

Sec. 3d, That the district court at the city of Keokuk shall have exclusive jurisdiction in all criminal causes, and in all appeals in civil causes from justices of the peace in the said city of Keokuk, and in the townships of Jackson, Des Moines and Montrose, in said county of Lee."

Provision is then made by the act, by which jurisdiction in all civil and criminal matters, as by law allowable, (except those arising in the city of Keokuk, Jackson, Des Moines and Montrose townships,) within the county of Lee, is conferred upon the district court to be holden at Fort Madison. The sheriff and clerk of the district court of the county are required to have offices at both places; and the former acts of the legislature fixing the times and places for holding the district court in Lee county are repealed. The effect of this enactment is to establish the city of Keokuk as a place for the holding of the district court in Lee county, for the transaction of judicial business within the city and the three townships named, in accordance with the terms therein specified.

It is contended by the defendant's counsel, that the venire for the summoning of the grand and petit jurors, requiring them to be taken from the city of Keokuk and the townships of Jackson, Des Moines and Montrose, and not from the body of the whole county of Lee, is defective in law, and in derogation of the right of the prisoner.

The right of the legislature to divide the county for judicial purposes is denied. The judicial power of the state

is invoked to maintain the rights of the accused, as guaranteed by the law of the land, and under the constitution. It is alleged that, by confining the selection of grand and petit jurors, the accused has been curtailed in his right to have his case submitted to juries made up of qualified voters chosen from the body of the county of Lee, as the venire required that they be taken from the townships of Jackson, Des Moines and Montrose, in the county of Lee.

It is clearly the province of the legislature, as it is their duty, to provide for the municipal convenience and welfare of the counties of the state in judicial policy. Public economy, as well as private interests, in view of the increase of population and business, may justly require change, productive of easement to the community. Judicial or other governmental arrangement adapted to the condition of a new state, when population is sparse and business transactions are few and unimportant, may, after a lapse of time, and increase and improvement, prove inadequate to the wants of the public. When such is the case, it is proper, indeed it becomes necessary, that the law should be changed to answer the demands of popular advancement. To effect this the legislative power may be invoked and exercised. This power is limited, and in a measure regulated, by the constitution of the state. The municipal affairs of the state are to be regulated by the common law, which remains unchanged by legislative enactment, when exercised without violation of the constitution. The law in question is confined in its operation to Lee county, and is so far local. Then how does this act of the legislature establishing the two courts, and dividing Lee county for judicial purposes stand, in view of the constitution, in its effect upon the rights of the accused?

The constitution of this state provides, "That the right of trial by jury shall remain inviolate." It secures to the accused a speedy trial by an impartial jury. That he shall be informed of the accusation against him, &c. By section 11th of the bill of rights, it is declared, that "no person shall be held to answer for a criminal offence, unless

on presentment or indictment *by a grand jury*; except in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia, when in actual service in time of war, or public danger." This being the language of the constitution, has the accused been deprived of the rights thereby secured to him, by the proceeding in this case? The record shows that the grand and petit jury consisted of the usual number of jurors, that an indictment was found and presented, and that he was held to answer thereto, and tried in the county where the offence charged was committed, by a court having jurisdiction of the case by virtue of legislative enactment. The supreme law of this state, then, so far has been observed. Since the declaration of rights in 1774, the right of trial by jury has been regarded as the birthright of every citizen. Chancellor Kent in his Commentaries, vol. ii., p. 13, observes that "It may be received as a self-evident proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned, or disseized of his freehold, or liberties or estate, or exiled, or condemned, or deprived of life, liberty or property, unless by the *law of the land*, or the judgment of his peers." The learned jurist then proceeds to say, that "the words, *by the law of the land*, as used in Magna Charta in reference to the subject, are understood to mean *due process of law*; that is, by indictment or presentment of good and lawful men, and this, says Lord Coke, is the true sense and exposition of these words." For aught that is apparent of record on this point, the accused was tried by *due process* of law, the jurors, grand and petit, were his peers of the vicinage, "good and lawful men," possessing the requisite qualifications. They were resident voters of the county of Lee. In this respect, there is no valid objection to either array. But it is urged that the accused had a right to have a grand and petit jury selected and summoned from the body of the county of Lee, and therefore the venire is defective, being confined in its operation to the townships of Jackson, Des Moines and Montrose, which

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compose only a part of the county. This objection goes directly to the constitutional validity of the legislative enactment, by which the county is divided for judicial purposes; the venire being in accordance with the spirit of that act.

The second section of the twelfth article of the constitution is cited as restricting the legislature, so as to invalidate the act establishing the court at Keokuk. By this section it is declared, that “no *new county* shall be laid off hereafter, nor old county reduced to less contents than four hundred and thirty-two square miles.” We cannot see how this section of the constitution can, by any reasonable construction, be made to apply to the point here raised. Lee county is one of the oldest counties in the state, organized before the constitution was adopted, and is the largest and most populous. The act in question does not reduce, or in any way change it territorially. Its square miles in number are as they were before this act was passed. The act only affects the internal and municipal organization and interests of the county. This the legislature had the power to regulate, upon the request of the inhabitants, under the restriction heretofore designated.

The townships of Jackson, Des Moines and Montrose, are within the county of Lee, and the jurors having been selected from them, were taken as required by law from the body of that county, and not of another. “The body of the county,” is to be considered as expressing the county limit, so as to prevent the selection of jurors residing without the county. We do not understand that the law requires jurors to be taken from every and all portions of the county. If so, by what rule are the fractions or subdivisions of the county for this purpose designated? The three townships which are set apart for judicial purposes in establishing the court at the city of Keokuk, contain a population amply sufficient for the procurement of a proper number of “good and lawful men” to constitute juries for the trial of criminal and civil causes. If, by reason of great excitement or otherwise, prejudice should exist

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against a party, so as to prevent a fair and impartial trial, the statute has provided a remedy by allowing a change of venue to another county.

By this act, all previous enactments passed for establishing the times and places of holding the district court of Lee county, are expressly repealed in the seventh section, and all acts providing for the judicial organization of that county with which the act conflicts, are also repealed by operation of law. This is not, therefore, an interference with any rights secured to the accused by the provisions of the constitution. There is no constitutional provision which prohibits the establishment of the additional time and place for holding the district court in and for Lee county. The decision of the district court in this matter was therefore correct.

But it is contended for the accused, that the court erred in not allowing his challenge for cause to jurors who had formed and expressed an opinion.

The bill of exceptions shows, that on proceeding to trial several jurors were called to the box, who, being sworn to answer questions touching their qualifications as jurors, answered that they had *formed* and *expressed* an opinion as to the guilt or innocence of the prisoner, whereupon the prosecuting attorney having refused to challenge them, they were challenged for cause by the prisoner's counsel, and requested to leave the box. Whereupon the court interposed, saying that it was improper to make challenges in that way, and ordered the clerk to call the jurors singly, which being done, Peyton Dawson, one of the jurors called, stated "that he had formed and expressed an opinion from the rumor or report he had heard in his neighborhood, soon after the murder was committed; that he had no acquaintance with the defendant, no ill-will or prejudice against him; that he had no personal knowledge of the circumstances of the case; that he had never heard any of the testimony or conversed with any of the witnesses; that his opinion was conditional; that if what he had heard was true, he had formed an opinion; if what he had heard

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was not true, he had formed none." Six other jurors being examined made the same statement. After this examination by the court, the counsel for the prisoner still urged his right to challenge the jurors for cause. The court overruled the challenge, and decided that the jurors were competent. Whereupon they were sworn in the case, and participated in making the verdict.

To this action of the court, the counsel for the prisoner excepted.

The right of the accused "to a speedy trial by an impartial jury," is secured by the constitution. It is therefore important in this case to ascertain from the record whether the jurors to whom the prisoner objected were "impartial" in the proper legal sense. By examining the origin of the trial by jury, and tracing its history through the progression of civil and political advancement, to the enlightened spirit which pervades civilization at the present day, we find that reason directed by truth has done much to render it a shield to the citizen against tyranny and oppression; whilst by it, the observance of law and justice are enforced. It has kept pace with the progression of political liberty. In England, during the reigns of James I. and Queen Anne, it was questioned whether an offender charged with a capital felony was entitled to examine witnesses on oath in his favor. In the seventh year of the reign of William III., witnesses were first allowed to prisoners on trials in certain cases. In the first year of Queen Anne, the right was extended to all cases of treason and felony. 4 Black. Com., 360.

Counsel was not allowed to the prisoner in case of high treason till the seventh of William III. It is a feature of English jurisprudence now, that where a man is indicted for a capital felony, he is not allowed counsel on the question of guilty or not guilty. But strange as these facts may seem to us in the United States at this day, they are scarcely more so, when properly considered, than that at this period of the world, the English judiciary should declare that a juror who had formed and expressed an

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opinion against a prisoner at the bar for trial, should not be challenged for that cause. In that country, and others similarly constituted in government, where kingly power still is struggling against the light of justice, and the liberty and equality of man as a citizen; where the government is enthroned above and against the people, and made by law independent of their will, such a doctrine might not seem strange. In this country, however, such is the spirit of our national and state constitutions and our statutes, that the citizen stands for security on a higher and more certain position to maintain his rights when arraigned before his country's tribunal. In this country, the protection and elevation of the citizen is the strength and security of the government.

In disposing of the question before us, we will then be governed by the light of American decisions, which best accord with the spirit of our constitution. Then, is it good cause for a principal challenge to a juror, in a capital case, that he has *formed* and *expressed* an opinion as to the guilt or innocence of a prisoner on trial, when that opinion has been formed on facts gathered from rumor, and believed by him so as to bring his mind to a conclusion on the subject? In the case of *The People v. Vermelyea*, 7 Cowen, 121, the learned judge who delivered the opinion of the court says: "It is admitted that every citizen whether arraigned for crime or impleaded in a civil action is entitled to a trial by a fair and impartial jury. The trial by jury is justly considered an invaluable privilege, but it would become a mockery if persons who had prejudged the case were admitted as impartial triers. All the elementary writers with the exception of Chitty lay down the proposition broadly, that if a juror has declared his opinion beforehand, it is a good cause of challenge. 1st Archbold, 181, 182. 2d Tidd, 779, 780. Bacon, (title Juries E.,) 5. Bull, N. P., 307. Lord Coke (1 Com. on Lit., 155, 156) says: "He ought to be least suspicious, that is, to be indifferent, as he stands unsworn, and then he is accounted in law *liber et legalis homo*: other-

wise he may be challenged and not suffered to be sworn," and he proceeds to consider what is meant by standing *indifferent*: "manifestly that the mind is in a state of neutrality as respects the person and matter to be tried; that there exists no bias for or against either party in the mind of the juror calculated to operate on him; that he comes to the trial with a mind uncommitted, and prepared to weigh the evidence in impartial scales." In the case cited, it is true that the opinion of Norwood, the juror, was formed from hearing the testimony on a former trial, not from rumor, as in the case at bar. But the ground upon which he was held to be incompetent by the supreme court was, that "he stated that, if the evidence on the second trial should be the same as on the first, he should pronounce them guilty." The point is this, that the mind of the juror was so prepossessed as to the case of the prisoner by what he had heard, that a conclusion was formed, to remove which other and stronger facts and circumstances must be presented with such irresistible force as to compel him to yield his position. We cannot perceive much difference between a juror who has formed an opinion from the hearing of the evidence on a former trial, and one who has formed it from a recital of the circumstances of the case as established by rumor. In both cases the facts are heard and believed, the mind prepossessed, and an opinion formed against the accused so conclusively, that it is expressed and published abroad. A man of firmness and decision of character, who has thus brought his mind to a conclusion, and expressed his opinion upon the facts of a case when not sworn as a juror, will not be likely to change that opinion when acting under oath, unless the evidence adduced on trial be so entirely different from the facts by him learned and acted upon, that he will be forced to it. Can such a juror be "*impartial*" in the sense of the constitution? Is he more open to conviction, less biased, and better prepared in mind to hear, weigh and fairly determine upon the case anew, than the man who stood by a former hearing, and

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heard the evidence? In view of the constitutional right of the accused, and of sound reason, if the one be incompetent to act as a juror, the other is also.

The courts have in this country decided that a juror who had tried a cause once would be incompetent to act as such upon a second trial. 1 G. Greene, 534.

Upon a review of the various decisions upon this and assimilated points, we hold it to be a good ground of challenge for cause to a juror, that he has formed and expressed an opinion on the question in controversy between the parties to a suit. In cases capitally criminal, this principle should be the more strictly observed. *Blake v. Millspaugh*, 1 John., 316; *Pringle v. Hughes*, 1 Cowen, 432; *Commonwealth v. Knapp*, 9 Pick., 499; *The People v. Rathbun*, 21 Wend., 542; *The Commonwealth v. Ruggell*, 16 Pick., 153; *The People v. Bodine*, 1 Denio, 281.

Much reliance is placed on the fact that the juror, after stating that he had formed and expressed an opinion, upon being examined further by the court, added, "that if what he had heard was true, he had formed an opinion; if what he had heard was not true, he had formed none." It is urged that his opinion was merely hypothetical; and this being the fact, that he stood indifferent. We are aware that decisions to this effect have been made by courts entitled to high respect. But none of these cases will meet the one at bar. Here the juror had expressed a positive opinion. It does not appear to have been hypothetically expressed. That expression must have been based upon an opinion previously formed. This explanation merely amounts to a qualification, which all will admit who have formed opinions upon what they have heard; that is, if what they have heard should not prove true, their opinions might be changed. The juror who has previously formed and expressed an opinion upon the merits of the case, cannot, when he enters the box, stand there indifferent, though that opinion be conditional or hypothetical. It is clear that the task of removing his mental bias must devolve upon the party against whom it exists. He is not free

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and uncommitted. An unconstitutional, unreasonable and therefore illegal condition, is imposed upon the party whose case has been thus prejudged. He must labor under a burden from which his adversary is free. This is at variance with the spirit of our institutions.

The allegation of inconvenience to judicial procedure in the procurement of jurors in cases like this, where the public mind becomes excited, insomuch that the minds of citizens are liable to be affected by rumor, cannot be received as a reason for dispensing with the observance of a right secured and made sacred by the constitution, and which is of vital importance to the citizen. They who are in this day of civil and religious light and liberty called to make and execute the law, should not turn back to minister to the improprieties of mankind, but rather to hold the standard of the constitution and the law up to its true elevation, that the citizen may see it and be raised to it.

If difficulty should occur in the procurement of jurors who will stand on the trial indifferent or impartial, the law has wisely provided for such a case, by allowing a change of venue.

Judgment reversed.

Dissenting opinion by KINNEY, J. Agreeing as I do with the court upon most of the points decided in this case, yet I am compelled to dissent from the decision upon the constitutional question which is here presented. A decision upon this question was not necessary; the other points raised by the bill of exceptions being well taken, a reversal of the case was inevitable. As a decision upon the constitutionality of this extraordinary legislative act is one of deep interest to the citizens of this state, it is with me a matter of regret that so important a question should be decided against the rights of the citizen unless absolutely necessary, and then not until after full argument and the most mature reflection. The consequences of such a decision are to my mind most alarming. A wide door is opened for the legislature of this state to

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divide every county for judicial purposes, and restrict the selection of grand and petit jurors to a particular township, village, neighborhood or ward. Is the constitution of Iowa so dissimilar to other constitutions? Is it so regardless of those great fundamental principles of civil liberty which have, ever since the formation of written constitutions, secured to the citizen an impartial trial by a jury of his peers? Does it repeal that clause in the ordinance of 1787, held in such high veneration by all jurists; and is it possible that rights so sacred are to be enjoyed at the will and mercy of a legislative body?

As I understand the constitution, such is not the case. The power contended for by the court has not, in my opinion, been delegated to the legislative branch of the government. I do not hesitate to say that the legislature may, for the convenience of the people of a particular county, pass a law by which the courts may be held in different places in the same county; but when they attempt to confine the selections of jurors within geographic limits less than the entire body of the county, they are assuming powers which are not conferred by the instrument which created them.

The constitution provides, "That no person shall be held to answer a criminal offence, unless by presentment or indictment by a grand jury," &c. What was here intended by the framers of that instrument? A body of men selected from a *particular locality*, or confined to a prescribed *township*, to the exclusion of all the other townships of the county? A grand jury I have always understood to be a number of men, not exceeding twenty-three, selected in such manner as should be prescribed by law, from the *body* of the county, and the *body* of the *county* is the *county* at large, over which the court has jurisdiction. But the constitution has defined the extent of each county formed or to be formed in the state by providing that no new county shall be laid off hereafter, nor old county reduced to less contents than four hundred and thirty-two square miles. The act of the legislature clearly violates the spirit and evident

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intention of this clause of the constitution. Three townships are constituted by the law a county for judicial purposes, which in territory are less than one-fourth the area prescribed by the constitution. Grand and petit jurors are to be selected from these townships alone; indictments found and returned, individuals tried and sentenced, and judgments rendered upon verdicts of jurors thus selected. The entire jurisdiction of the court is as completely and perfectly confined to the three townships as it is to any county over which the court may preside. True it is that the legislature do not attempt by *name* to organize a county out of the townships of Jackson, Des Moines and Montrose, nor give them a name and place among the counties of the state as a separate county organization, for this would be so flagrant a violation of the *letter* of the constitution that it would strike the mind of every person as utterly incompatible with the provisions of that instrument. But the result in the administration of justice is the same, and the constitutional rights of the citizen no less infringed than if such a separate county organization had been effected. The county is practically reduced to a less number of miles than the constitutional limits, and the legislature are permitted by the decision to pass laws which in effect produce the same results as would that legislation which the constitution directly and in unequivocal terms forbids.

The venire for the grand jury, instead of being co-extensive with the county of Lee, is confined to three townships, and when the sheriff oversteps these township lines for the purpose of serving his writ, he is as much out of his jurisdiction as though he were in another county or state. According to the construction given the law, a juror summoned from another township is no more entitled to a seat in the jury room, although he resides in the same organized county, than if he had been summoned from the adjoining state of Missouri.

The law provides that the grand and petit jurors to serve at the district courts held at Keokuk shall be selected from

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the townships of Jackson, Montrose and Des Moines, and that grand and petit jurors to serve at the district courts held at Fort Madison in said county, shall be from the remaining townships in said county, and no other.

The 2d section provides that the number of grand and petit jurors for each division of the district court, and the manner of ascertaining the proportion to each township, and of giving notice thereof, returning, drawing, &c., shall be the same for each division of said courts or districts, as though they were *separate counties*. Thus the legislature in express terms makes each division of the county as complete and perfect for judicial purposes as is any constitutional county within the state. If the legislature possess under the constitution this power, then indeed have the people unconsciously, by their state organization, yielded up some of their dearest rights; and the constitution, instead of proving a blessing and protection, has left the door wide open for legislative oppression. If the legislature have the power to form three townships into a county for judicial purposes, confining the selection of grand and petit jurors to those townships, then they have the power to embrace in a similar law only one township; and if one township, then a particular school district. Thus an indictment, instead of being indicted by impartial jurors, taken from the *body* of the *county*, may be indicted by those selected from his immediate vicinity, and the indictment found under the influence of excitement, prejudice or malice. The accused may be imprisoned upon the indictment to await his trial, and in this way unjustly deprived of those natural liberties which the constitution, it would seem, has vainly attempted to protect, and in the enjoyment of which he would have been secure, had the grand jury been taken from the county at large.

If the legislature possess the power contended for by the court, then that power is unlimited, and may be exercised over the smallest extent of territory in every county within this state.

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But there is another, and, if possible, more formidable, constitutional objection to this law.

The law provides that the district court at the city of Keokuk shall have exclusive jurisdiction in all criminal cases, and in all appeals in civil causes from justices of the peace in the said city of Keokuk, and in the townships of Jackson, Montrose and Des Moines, in said county of Lee. This legislation is both local and partial. The *subject matter* of the law is general and universal, and should be made so in its application. A law by which the citizen is to be tried for crime should be general, bringing within its corrective influence all the citizens of the state alike, and not partial and limited in its operations. Justice should be dispensed from all portions of the state from the same pure fountain. The individual who is indicted and tried in Lee county, ought to be indicted and tried by the same general law as the one in Dubuque county, and entitled to the same privilege and protection. All this is impossible under the law in question. While the citizens in all the other counties of the state, before they can be made to answer to a criminal charge, must be indicted by a grand jury selected from the *body* of the *county*, those of Lee are compelled to submit to a prosecution upon an indictment found by a grand jury taken from three townships of the county. While the venire for the petit jury to try those charges is co-extensive with the county in every other county of the state, in Lee it is absolutely confined to the geographical limits of certain designated townships.

Hence law and justice are administered in Lee county in one way, and in the other counties composing the same judicial district in another way entirely dissimilar.

Section 6 of the bill of rights provides that "all laws of a general nature shall have a uniform operation." The act passed by the legislature is of a general nature. It provides for the selection of grand and petit jurors, by which persons are to be tried for the highest crimes known to our laws. Instead of being uniform and universal in

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its operation upon all the citizens of the state, it is made local and partial, confined to the townships of a particular county.

Suppose the legislature had passed a law by which the crime of petit larceny should be punished in the county of Lee by imprisonment in the penitentiary, while in all the other counties it was merely punished with confinement in the county jail, could it admit of a doubt but that this act would be contrary to the plain and express provision of the constitution? I cannot think that such a law would be more obnoxious than the one in question.

And it may well be doubted whether the act providing for this new and extraordinary mode of proceeding, does not infringe upon that clause of the constitution which declares "that the right of trial by jury shall remain inviolate." It appears to me, that this not only secures the right of trial, but that every citizen shall enjoy that trial according to those great distinctive features which have not only always characterized a jury trial, but which are essentially necessary to the enjoyment of the right so secured.

J. C. Hall, for plaintiff in error.

Hollman and Stephens, for the state.



WARBURTON *et al.* v. LAUMAN.

Where in a mortgage a lot was by mistake designated as 18 instead of 8, and was correctly described in a subsequent mortgage, which was executed subject to the first, with notice of the mistake; held that the first mortgage should attach to lot 8, and be regarded as senior to the subsequent mortgage.

In equity, mistakes in a deed will be corrected, as against subsequent purchasers with notice.

Notice to an acknowledged agent is notice to his principal.

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Although contracts cannot be changed, they may be corrected so as to enforce the intention of the parties.

IN EQUITY. APPEAL FROM HENRY DISTRICT COURT.

Opinion by KINNEY, J. Lauman filed a bill in the district court of Henry county against Albert Button *et al.*, to foreclose a mortgage on lot 8, block 4, in the town of Salem, in said county, which was executed by Button, as is alleged, by mistake, on lot 18, block 4, instead of lot 8, as was intended by the mortgage, and claiming priority over a junior mortgage to Warburton, Rossiter & Co., on the lot intended to be conveyed to said Lauman, but which was subsequently mortgaged to said Warburton, Rossiter & Co.

The bill alleges that Button, on the 8th of January, 1848, became indebted to Lauman in the sum of \$500, and on that date gave his note for the same, payable May 1, 1848; that he executed a mortgage by agreement to secure the payment of said note, intending to mortgage lot 8, block 4, in the town of Salem; that Button owned said lot at the time, and resided upon it as his homestead, and by mistake and accident, the property was described as lot 18, in block 4, instead of lot 8, as it should have been; that there is no such lot as 18 in said town of Salem. That afterwards, on the 10th of January, 1849, said Button being indebted to Warburton, Rossiter & Co. in the sum of \$912.50, and being called upon to give security for said debt by James Livingston, acting as agent for said firm, said Button and wife executed a mortgage to said firm on said lot 8, block 4, subject to the mortgage of said Lauman, as is expressly mentioned in the mortgage to them. That said Livingston had full notice of Lauman's debt and mortgage, supposing it to be on lot 8, block 4; and said Livingston accepted the mortgages to Warburton, Rossiter & Co. with such notice, and with the understanding that Lauman's mortgage was a prior lien. That all parties were ignorant of the mistake until both mortgages had been executed, and Lauman's recorded.

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The answer of Button admits the indebtedness to Lauman, giving the note of \$500, and the security for the same by mortgage. That the consideration for the indebtedness was a stock of goods, and that Button proposed to give a mortgage on his brick house and lot as an inducement for the credit. That when he went to purchase said goods, he took with him the title deeds by which he held the lot, which was known and described on the plat of said town as lot 8, in block 4. That respondent, after the purchase of said goods, executed his note, and the deed was given to one Fayrweather, with instructions to make out a mortgage from said respondent to said Lauman. That said mortgage was drawn up and acknowledged, and deposited for record. Respondent further states, that on the 9th or 10th day of January, 1849, one J. M. Livingston, a clerk and agent of said Warburton, Rossiter & Co., applied to him to give said firm a mortgage on said lot 8, in block 4, to secure the debt due them, which respondent at first refused, on the ground of Lauman's prior claim, and informing said Livingston that he had previously executed a mortgage to said Lauman on said lot, being the brick house and lot occupied by respondent, to secure the sum of \$500, which was then due and unpaid; and that said house and lot were not of sufficient value to secure both debts. Respondent at length yielded to the solicitations of said Livingston, and on the 10th day of January, 1849, executed the mortgage in said bill mentioned, alluding in said mortgage to Lauman's prior mortgage. That at the time of executing the mortgage to Lauman, he did not, nor has not since, owned any other real estate in said town except the lot aforesaid; and he informed said Livingston that lot 8 was the lot on which he resided.

Respondent further said, that he did not discover the mistake made in the mortgage to Lauman until after he executed the one to Warburton, Rossiter & Co.; and that he first learned of the error in the mortgage to Lauman by Livingston informing respondent that he discovered

the mistake when he went to put his mortgage upon record.

The answer of Rossiter & Drake acknowledges ignorance of the transaction between Button and Lauman, and of the alleged mistake in the description of the property in the mortgage to Lauman. They admit the indebtedness to be correctly stated in the bill; admit the receiving of said mortgage to secure such indebtedness by Mr Livingston, their clerk and *agent*, but deny that they knew of any mortgage to complainant, or had any knowledge of any equitable lien by him on lot 8, in block 4. That they cannot tell precisely what knowledge Livingston may have had when he accepted the mortgage from Button to them. That they reside in St Louis, and are personally ignorant of the matters charged in the bill. They insist that they are *bona fide* mortgagees without notice of any prior incumbrance. That if all the matters in the bill are true, that the complainant is not entitled to any relief as against them, but that the mortgage to Warburton, Rossiter & Co. is entitled to priority of satisfaction out of the lot of ground thereby mortgaged.

The cause was tried upon the bill, answers, exhibits and testimony, and a decree rendered in favor of Lauman for \$579; also correcting the mistake in the mortgage from Button to him, so that it should be treated in all respects as a mortgage on lot 8, in block 4; also that said mortgage from Button to Lauman have priority over the mortgage from Button to Warburton, Rossiter & Co. That the equity of redemption to said lot be foreclosed, and that the sheriff sell the same, and apply the proceeds thereof: first, to the payment of costs; second, to the satisfaction of the debt to Lauman; and the residue, if any, to be paid into court, subject to the mortgage of said Warburton, Rossiter & Co.

We think this an equitable decree. Button confesses all the charges in the bill, and the correctness of the decree as against him cannot be questioned. Was the mortgage to Lauman entitled to priority over the one from Button

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to Warburton, Rossiter & Co.? If the respondents took their mortgage with a notice of Lauman's prior equitable right, the doctrine is well settled, that it must be held subject to such prior equity. That their acknowledged agent had such notice, the record and testimony abundantly establish. Livingston was not only informed of the fact by Button, but in the mortgage to the respondents, the prior mortgage is referred to in express terms. This recital in the mortgage of a prior incumbrance is of itself notice of such incumbrance. Livingston was acting in collecting and securing the demand against Button as the authorized and acknowledged agent of respondents, Warburton, Rossiter & Co. His acts, while within the sphere of his agency, were the acts of his principals. Notice to him was notice to those for whom he was acting. But even if this were not so, the reference of a prior existing mortgage in the conveyance would be sufficient to charge the purchasers. 2 Powell on Mortgages, 573 and notes.

But notwithstanding this notice, and that respondents received the mortgage with the understanding and expectation that it was to be subject to the prior one to Lauman, yet as no such prior one did in fact exist on the lot mortgaged to Warburton, Rossiter & Co., therefore it is said the latter must take priority. This would be true if it had not been the *bona fide* intention of Button to have mortgaged lot 8, and Lauman to have received a mortgage on said lot, and if the mistake in the description had not been entirely unintentional. But it is the especial prerogative of courts of equity to correct such mistakes, and not only to carry out the intention of the parties when fully understood, but to place them as near as possible in the position which they assumed to occupy at the time of the contract. Could Button have taken advantage of this mistake? if not, is Lauman's equity less because his mortgagors, with full notice of the equity, attempt to do so? What did they expect to gain by the conveyance? Most certainly nothing more than a junior incumbrance. Would it be equitable to give them *more* at the

sacrifice of an equitable interest which, beyond all question, did exist at the time of their conveyance, and to which they had a direct reference at the time they received it. The error in the deed was not the fault of Button or Lauman, but the mistake of Fayrweather, who drafted it.

As appears from the record, both parties supposed that the lot was numbered correctly in the mortgage. Lot 8 was clearly intended to have been conveyed. Button owned no other lot in Salem. Livingston first discovered the mistake in the mortgage to Lauman, and in a letter to Button, which is made an exhibit in the case, speaks of the "mortgage on lot 18, instead of 8, as it should be." So that the misdescription of the lot is not only fully shown to have been a mistake, but it is recognised and admitted as such by the agent of Warburton, Rossiter & Co.

Will courts of equity relieve such mistakes against subsequent purchasers for a valuable consideration, if such purchaser had notice of such prior equitable incumbrance, and there is a mistake? The following authorities clearly establish the affirmative of this proposition. 1 Story's Eq., 179, 165; 2 Pow. on Mortgages, 532, note *a* and *c*; 1 John. Ch., 300; 3 Pier Williams, 307; 1 Maddock Ch., 65.

In the case of *Gouverneur v. Titus*, 6 Paige, 347, the owner of the north-east corner of a lot of land sold the same, but by mistake described it as the north-west corner of the lot, (belonging to another person,) and the purchaser afterwards sold the same, and made the same mistake in his deed. Subsequent to this conveyance a judgment was obtained vs. the first grantor, and the land intended to have been conveyed purchased on such judgment by the judgment creditor, at which time the mistake in the deed was discovered, and the purchaser had notice thereof. A, the first grantor, and B, who had conveyed to C with the same mistake in the deed, then joined in a new conveyance or deed of confirmation to C, in which the premises were correctly described. The alleged mistake

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being fully established, and the sheriff's deed not having been made to the purchaser upon execution, the court discharged the premises from the lien of the judgment, and granted a perpetual injunction against the claim of the purchaser under the judgment. Courts of equity will ever, unless the transaction is tainted with fraud, relieve all such errors of fact against subsequent purchasers, with notice of antecedent intended conveyances. In the above case the judgment was obtained without notice, which became a lien upon the premises intended to have been conveyed, but as the purchase upon execution was made with notice, the lien was properly set aside, and the deed enjoined. "A written agreement may contain more or less than the parties intended, or something different from their intentions. These mistakes may happen either from carelessness on the part of the draftsman, or ignorance as to the legal or proper mode of executing the instrument. In either case, when made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties."

While courts of equity will not make new contracts for parties, or change them from their original intention and purpose, yet they will reform and correct such contracts, not only as between the parties, so as to carry out their intention, but as against subsequent purchasers with notice. It is the intention of the parties that will prevail in courts of chancery, in preference to the mere act, when by that act the object of the parties could not be attained.

By carrying out the intention of Button and Lauman, by reforming Lauman's mortgage, (in order to do so,) Warburton, Rossiter & Co. are placed in no worse position than they supposed at the time they obtained their deed. They secured their mortgage with the express understanding that it was to be subject to Lauman's prior equity; and as that equity actually existed, to give *theirs* priority would be, not only to defeat the intention of the parties in giving and receiving it, but would be equivalent to making a new contract for them.

 Price & Co. v. Alexander & Co.

Pure equity cannot be meted out to Warburton, Rositer & Co., except by giving priority to Lauman's incumbrance, as, if the mortgage to W., R. & Co. is to be first satisfied, they obtain more than they stipulated for in the deed from Button to them.

Hence, by giving Lauman's mortgage priority, equal and exact justice is done to all parties. They are placed by such decree in the position they assumed to occupy at the time the respective conveyances were executed.

Decree affirmed.

D. Rorer, for appellants.

Grimes and Starr and Morton, for appellee.



PRICE & CO. v. ALEXANDER & CO.

Where A contracts with B for a share of the profits, as such, in any business transaction, he would be considered a partner as to third persons; but where he was to receive a share of the profits as compensation for services, as between themselves, they would not be considered partners.

An instrument under seal, executed by one partner, and assented to by the other, will bind both as a firm.

The rule that one partner cannot bind his co-partner by sealed instruments, does not prevail if the instrument would be equally valid without seal and within the scope of the partnership business.

Where special instructions asked were included in those of a more general character, it was not error to refuse them.

ERROR TO LEE DISTRICT COURT.

Opinion by GREENE, J. A. Alexander & Co. commenced this suit before a justice of the peace, and obtained a judgment against Joseph Price & Co. The case was taken to the district court by appeal, where Alexander & Co. again obtained a verdict and judgment for \$75, the amount rendered before the justice.

Price & Co. v. Alexander & Co.

In the court below, the plaintiffs offered certain articles of agreement made under seal by the respective firms of "A. Alexander & Co." and "Joseph Price & Co." on the 22d of March, 1848. The agreement stipulated that Alexander & Co. should appropriate such portion of their wharf and warehouse in the city of Keokuk as might be necessary to carry on the storage and forwarding business during the navigable season of 1848, and permit said Price & Co. to keep their wharf boat in front of said wharf, to be used by them in the storage and forwarding business during the same period. The respective firms, as parties to the agreement, were required to keep books, and enter therein the daily transactions of their respective operations in said business. They also agreed to conduct the "business at their respective places aforesaid, upon their own capital, and at their own expense, and each to bear and sustain any and all losses that might accrue to them respectively in said business." It was also stipulated, in the language of the agreement, that they should "pay over to each other mutually, after the date of this instrument, one half of the clear nett profits realized by said parties from the storage business respectively. It is understood, however, that any and all moneys received by said Price & Co. from storage during the time they may be at another landing during high water, shall be used and disposed of by the said Price & Co. exclusively." It was then agreed that if either party should fail to pay the money as specified, the other party might, at his option, terminate the contract. Price & Co. agreed not to sell certain articles at wholesale, and also to pay Alexander & Co. \$25 as a bonus for all the business they might transact by the storage of emigrants' furniture, &c. To the admission of this agreement in evidence the defendants interposed two objections: 1. Because the contract could not be effectual, as one partner could not bind another under seal, and as the agreement constituted a partnership, wherein one partner could not sue another; and 2. Because the agreement was not signed by the in-

dividual parties to this suit, but by the respective firms; and therefore, as one member of a firm cannot bind his co-partner under seal, the partners not signing the agreement were not bound. But the court, overruling the objections, admitted the agreement in evidence. It is now contended that this ruling of the court was erroneous; and this involves two questions for adjudication: 1. The character of the contract; and 2. The liabilities of the parties.

1. As a general rule, a partnership creates a community of interest, of duty and of responsibility among the members of the firm. Such an association, when not qualified or limited in its character, makes each member a participant in the profits, and a contributor to the losses resulting from the operations of the partnership. The authorities are uniform upon this point. But the books show a manifest distinction in partnerships as existing between the parties themselves, and as existing between them and others. There may be a connection in business between A and B, in which they would be legally adjudged partners in relation to others, but not so as between themselves. 6 S. & R., 333; 9 John., 489; 17 *ib.*, 40; 6 Pick., 372; 12 Vt., 291; Gow. on Part., 11.

Ordinarily, where a person contracts for a share of the profits, as such, in any business enterprise, he has been considered a partner as to third persons, even if stipulated in the contract that he should not be liable. This general rule is predicated upon principles of public policy in relation to commercial transactions, and upon the proposition, sanctioned by natural justice, that he who shares in the profits, ought also to contribute to the losses of the business, by paying creditors for furnishing means out of which those profits might have been realized. To this rule, however, there are many nice qualifications and exceptions, chiefly pertaining to profits acquired, not in the capacity of a partner, but in the character of an agent or otherwise, as compensation for labor or benefits furnished; not as a specific interest in the business, but under the stipulation that he should be rewarded by a given sum,

in proportion to the quantum of profits, without being clothed with the rights, powers, and duties of a partner. But if the arrangement secures to the party a specific interest in the profits themselves, as profits, in contradistinction to a stipulated portion of them as compensation, he incurs the liabilities of a partner. In *Louis v. Morehall*, 12 Conn., 69, A entered into an agreement with B to furnish a full supply of wool for his factory for two years; B was to manufacture the wool into cloths, and A have 55 per cent. of the nett proceeds, and B 45 per cent., they contributing in the like proportions for warp, insurance, &c. In an action by C against A and B as partners, for work in the factory, it was held that they were not liable as partners. In *Ambler v. Bradley*, 6 Vt., 119, it was held that where A owned a mill, and agreed with B to work it for half the gross earnings, they were not partners.

It was held in *Rice v. Austin*, 17 Mass., 197, that an agreement between two persons to share in the profits of an adventure or concern does not necessarily constitute them co-partners in that respect. See also upon this point, *Baxter v. Rodman*, 3 Pick., 435; *Cutler v. Winsor*, 6 *ib.*, 335; *Gallop v. Newman*, 7 Pick., 282; *Denny v. Cabot*, 6 Met., 82. *Borman v. Bailey*, 10 Vt., 170, was a case where one party furnished a boat, and the other sailed it, with an agreement to divide the gross profits; and it was held that this did not constitute a partnership. See also *Dunham v. Rogers*, 1 Barr., 255; *Burkle v. Echart*, 1 Denio, 337; *Clement v. Hadlock*, 13 N. H., 185; *Bradley v. White*, 10 Met., 303; *Johnson v. Miller*, 16 Ohio, 166; Story on Part., §§ 34-36.

Under the guidance of these authorities, and those cited by counsel for the defendants in error, the character of the agreement in the present case cannot well be mistaken. In that instrument, the leading ingredients of a partnership are wanting. It was the manifest intention of the parties that the relation of partners should not subsist between them. It is expressly stipulated that the business of each party should be conducted by themselves,

upon their own capital, at their own expense, and subject to their own losses. Price & Co., for the privilege of having their wharf boat at the wharf of Alexander & Co., and for half the receipts of their storage business, stipulate to pay them a sum equal to one-half of their nett receipts from the storage and forwarding business, and also a bonus of \$25 for all business they might transact by the storage of emigrants' furniture, &c. Under the analogies of the foregoing cases, it may be well doubted whether this agreement would constitute a partnership as to third parties; but obviously, as between themselves, *inter se*, the relation of co-partners never was contemplated. The one party had no right, control or management over the business of the other, nor incurred either loss or liability. In order to constitute a partnership, *inter se*, there must be a sharing in losses as well as in profits. In *Vanderburgh v. Hall*, 20 Wend., 70, such were considered the indispensable requisites to any partnership; and in *Laury v. Brooks*, 2 McCord, 421, where there was no mutual interest in the capital invested, and no stipulation for mutual loss, it was not considered a co-partnership. Chancellor Walworth, in *Chase v. Barrett*, 4 Paige, 160, decided "that to constitute a partnership, as between the parties themselves, there must be a joint-ownership of the partnership funds, according to the intention of the parties, and an agreement, either expressed or implied, to participate in the profits or losses of the business, either rateably or in some other proportion to be fixed upon by the co-partners." Apply this test to the contract in this case, and it will be obvious that no partnership subsisted between the parties. It was manifestly the intention of the parties that no such association should exist between them. It was an arrangement in which benefits were to be realized by one firm from the other, and compensation conferred in proportion to the profits of a particular branch of their respective business operations; and, unlike a partnership arrangement, the one party was expressly excluded from any participation in the business

of the other, contributed nothing, and incurred no loss. The stipulations in the agreement, its qualifications and guarded phraseology, are repugnant to essential elements of a partnership *inter se*, and show that it could not have been contemplated by the parties. Judge Story, in his work on Partnership, § 30, says: "It may be laid down as a general rule, that in all such cases no partnership will be created between the parties themselves, if it would be contrary to their real intentions and objects." We conclude, then, as between the parties, that no partnership existed, and therefore the agreement, in that respect, was admissible in evidence.

2. The agreement was next objected to on the ground that it was not a contract between the parties to this suit, as one member of a firm cannot bind his co-partner under seal. This rule, in its general application to common law proceedings, cannot be disputed. But, originating chiefly from technical reasons connected with the doctrine of agency, it has been considerably relaxed by recent decisions, in order to accommodate the advancement of commercial intercourse, and the exigencies of business associations.

It now appears to be well settled that a sealed instrument made by one partner in the name of the firm, is binding upon his co-partners who assent to the contract before its execution, or subsequently adopt it either by parole or other evidence of ratification. *Cady v. Shepherd*, 11 Pick., 405; *Clement v. Brush*, 3 John. Cas., 180; *Bond v. Millin*, 6 Watts. & Serg., 165. In *Swan v. Stedman*, 4 Met., 518, it was held that the adoption of such an instrument might be shown by mere silent assent thereto.

It now remains to be seen whether John Rivereau, of the firm of A. Alexander & Co., and Silas Haight, of the firm of Joseph Price & Co., have sufficiently assented to and adopted the instrument signed by their respective partners in the company names. So far as Rivereau is concerned, the simple fact that the suit was brought in the partnership name, amounts to a sufficient adoption of

the instrument on his part, and precludes the defendants from denying his participation in its execution. *Dodge v. McKay*, 4 Ala., 346. In relation to Haight, it appears by the bill of exceptions that the plaintiffs below introduced him as their witness, and among other things proved by him, that the firm of Joseph Price & Co. consisted of said Price and himself; that after said agreement was drawn up, it was shown to him, and he assented to its correctness, and was satisfied with its provisions, and that under it the respective parties went on and transacted business. That this amounted to a full sanction and ratification of the agreement by all the parties, cannot, we think, be questioned.

Again, it appears by the testimony of Haight, that the said firms were engaged in the storage, forwarding and commission business at the time the contract was entered into, and it may therefore be very correctly regarded as within the scope of their commercial dealings, as an agreement which would have been equally binding upon the parties without a sealed or even a written instrument. It could not, consequently, be vitiated by the addition of a seal. 1 Brock., 456; 3 U. S. Dig., 393, § 26; *Deckard v. Case*, 5 Watts, 22. In *Tapley v. Butterfield*, 1 Metcalf, 515, it was held, that one partner has authority, without even the knowledge of his co-partner, to mortgage the whole stock in trade, to secure a particular creditor of the firm; it was also held, that the rule that one partner cannot bind his co-partner by deed, does not prevail when he thereby conveys property of the firm which he might have conveyed without such deed; and hence it was concluded by the court, in that case, that the sealed mortgage of the goods executed by one partner in the name of the firm bound both of them, and constituted a valid lien upon the property. These authorities show to what extent the rule in question is relaxing in its adaptation to business operation, and they also support the conclusion to which we have arrived in this case, that all the parties to this suit became parties to, and were held by, the instrument in question.

3. Evidence was given by the defendants below, showing that the plaintiffs, after the contract was entered into, ceased to do business as forwarding and commission merchants, and that in consequence the defendants had been obliged to hire additional hands, and also that by virtue of a city ordinance, they had been compelled to pay \$47 wharfage.

In relation to this evidence, instructions were given, to which objections are urged. We have carefully examined the several instructions, as given, refused or qualified by the court, and can see nothing that will justify a reversal of the proceedings. Upon the first branch of the evidence the jury were instructed, that if plaintiffs abandoned the contract before any violation thereof by the defendants, that they also had a right to abandon it on their part, provided the abandonment of plaintiffs was not by their consent or at their request. They were also instructed, that if the plaintiffs neglected to perform their part of the contract, in consequence of which the consideration of the agreement failed, they could not recover. These instructions, we think, comprise all that was material for the defendants below, and all they should require in a just submission to the jury, or in a fair adjudication of their rights. Upon the other point, the court instructed the jury that if, after the contract, an ordinance was passed creating a liability on either party, by way of taxation or license, and if the parties still continued to act under the contract as they did prior to the passage of such ordinance, it could not be set up in avoidance of the contract. We think the plaintiff in error has no reason to complain of this instruction. It is stipulated in the contract, that it should not interfere with any ordinance that might be passed relative to the landing, the wharf, and wharf boats. It appears, then, that such ordinances were anticipated when the agreement was entered into, and still the parties agreed that they should respectively conduct their own business, at their own expense, and sustain their own losses. Any tax for license upon the business of either firm would come

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under the denomination of expenses, which, according to the agreement, should be defrayed by the party incurring them. And agreeable to the instruction, if the party voluntarily continues in the transaction under such additional expense, it shows an acquiescence in it, which will prevent an avoidance of the contract.

It is true that a portion of the special instructions asked for in this case might have been given with propriety, but as the substance of those special instructions were included in those of a more general character, there was no impropriety in refusing them. *Gentry v. Borgis*, 6 Blackford, 261.

Judgment affirmed.

J. C. Hall, for plaintiff in error.

W. J. Cochran and *C. E. Stone*, for defendants.



GREENOUGH v. WIGGINGTON AND WIFE.

Where the husband and wife jointly contract for the erection of a building on the land of the wife, a mechanics' lien under the statute may be enforced against the property.

In a proceeding for a mechanics' lien, rules both of law and of equity are authorized.

Law and equity act in concert, so far as general personal engagements of man and woman are concerned.

Generally a debt contracted by a woman during coverture is *prima facie* evidence to charge her separate estate.

ERROR TO DES MOINES DISTRICT COURT.

Opinion by GREENE, J. Bill filed by the plaintiff against Wiggington and wife for a mechanics' lien. The bill shows that the defendants, during coverture, made a contract with the plaintiff for the erection of a house upon

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a lot in the city of Burlington; that the lot was owned by Ann Wiggington before her marriage, and still belonged to her; and that the house was completed according to contract, but that payment had not been made. To this bill the defendants filed a demurrer, which was sustained by the court below.

In support of that decision, it is now urged that the wife is not bound by any contract made during coverture, and that her title to the land cannot be incumbered by a mechanics' lien under such contract. Upon a superficial view this position would appear plausible; for, as a general rule, *feme covert*s cannot make valid contracts which courts of law would enforce against them. But to this rule there are exceptions, even upon common law principles, besides those which are interposed by statute.

This action was commenced under our statute relative to mechanics' liens, and is authorized on all contracts made between the owner of any tract of land or town lot, or the lessee thereof, with the owner's knowledge or consent, on the one part, and any person on the other part, for furnishing labor or materials to erect or repair any house, mill, or machinery. The contract, as set forth in the bill at bar, was not only made with Ann, the separate owner, but also with her husband, who could claim no greater right than a lessee, entitled to rents and profits for life, and the building was erected, not only by the consent, but by the direct agency and procurement of both, and for the especial benefit of the wife's separate estate. All who were interested in the lot participated in the contract, by which the value of the land was greatly enhanced at the expense of the plaintiff. In all such cases the statute clearly provides a lien to the party furnishing the labor and materials, without any reference to the sex or condition of the party owning the land.

The husband and wife had the power to sell the real estate by joint conveyance. Stat. of 1846, p. 4, § 4. Nor would their power to incumber the estate by mortgage be questioned. How then can it be doubted that they had

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power to make contracts by which the land would be held responsible for improvements made upon it?

The right of a married woman to own and possess real estate as of her own property, is expressly acknowledged by statute. Whether she acquire the title before or after coverture, "she shall," in the language of the law, "possess the same in her own right." Laws of 1846, p. 4, § 2. True the control and management, the annual productions, rents and profits, go to the husband as at common law. But all suits affecting the property or possession must be prosecuted or defended in the joint names of the husband and wife. To carry out the spirit of this act, it must follow that the title to the land can only be affected by contract with the wife as well as the husband. And although expressly released from all liability to the debts of the husband, it by no means follows that it is released from the debts of the wife when contracted jointly with her husband for the purpose of improving her separate estate.

The statute of this state does not materially enlarge the rights of married women in equity, but it gives them the same powers and privileges at law over her estate which before could only be asserted in a court of equity. If, then, this suit should be regarded as a proceeding at law, the principles of equity applicable to a wife's separate property might have a controlling influence in deciding this case. But it is something more than a proceeding at law. The very object, the form and the result, of the action, show it to be assimilated to chancery jurisprudence. The act authorizes the filing of a bill or petition as in chancery, but to secure a more speedy trial, directs the case to be docketed on the common law appearance docket; and that the same rules of evidence shall be observed as in suits at law. At the same time it requires the court to "give judgment according to the justice and equity of the case," and not according to the strict rules of law. The obvious intention of the legislature then was, to give an easy, cheap and sure remedy to that class of community

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for whose benefit the law was passed, by extending to them all the facilities of common law evidence without the delay and expense of taking depositions, and extends, at the same time, all the liberal and appropriate rules of equity. In deciding this case, then, we are authorized to go beyond the strict rules of law, and appeal to chancery principles in order to arrive at "the justice and equity of the case." Law and equity act in concert so far as *general* personal engagements of married women are concerned. Such contracts cannot affect their separate property. But as a necessary result of the principle that a married woman may take and enjoy property to her separate use, equity enables her to deal with it as a *feme sole*. Such an interest and power, whether recognized in a court of chancery or created by statute, produce, as an incident, the right of disposition or appointment; the power to sell, pledge, or incumber her separate estate. And it is only necessary to have her *intention* to sell, pledge or incumber her estate indicated, in order to give effect to the transaction. A debt contracted by a woman during coverture, either as principal or as surety for her husband, or jointly with him, is generally held to be *prima facie* evidence to charge her separate estate, without proof of a positive intention to do so. 2 Story Eq. Jur., § 1400. The equity doctrine seems to be well established in England, that such engagements by married women would bind their separate estate. *Hulme v. Tenant*, 1 Brown Ch. C., 16; *Sillia v. Airey*, 1 Ves., 277; *Balpin v. Clark*, 17, *ib.*, 277; 6 Eng. Ch. R., 43; 9 *ib.*, 1. And the American cases which we have examined go to the full extent of the English decisions. *Jacques v. The M. E. Church*, 17 John., 548; *N. A. Coal Co. v. Dyett*, 7 Paige; *Gardener v. Gardener*, *ib.*, 112; *Curtis v. Engel*, 2 Sand Ch. R., 287.

Viewing this case, as we feel authorized, upon equity principles, there can be no doubt that Mrs Wiggington's separate property should be held responsible for the debt, contracted by herself and husband for the benefit of her estate. It would be rank injustice to suffer a *feme covert*

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to enter into such engagements, secure valuable improvements upon her real estate, and then exempt it from liability for those improvements. No decision from a court of justice should ever countenance such a system of fraud. The averments in the bill sufficiently show that the work and materials were obtained upon the credit of her property, that all inured to her individual benefit, that her own undertaking in the premises express an *intention* to charge her separate estate, and that it was upon the faith of such security that the plaintiff performed the work. Upon such a showing, we think the plaintiff's prayer for a lien should have been entertained by the court below, and that the demurrer should have been overruled.

Judgment reversed.

Grimes and Starr and M. D. Browning, for plaintiff in error.

D. Rorer, for defendants.

CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT OF THE STATE OF IOWA,
OTTUMWA, JUNE TERM, A.D. 1850,

In the Fourth Year of the State.

Present:

HON. JOSEPH WILLIAMS, *Chief Justice.*
HON. JOHN F. KINNEY, } *Judges.*
HON. GEO. GREENE, }

HICKS v. WALKER.

Where the county and state are named in the margin of a declaration, and the county is referred to in its body as "Monroe cty," held that the venue was sufficiently stated.

In an action of slander, where general damages only, such as the law implies from words actionable *per se*, are claimed, the declaration need not specify damages!

ERROR TO MONROE DISTRICT COURT.

Opinion by GREENE, J. An action on the case, in which the following is the form of the declaration •

Hicks v. Walker.

"State of Iowa, }
 Monroe Co. } ss.
 William Hicks }
 vs. } Case.
 John Walker. }

"John Walker, the above named defendant, was summoned to answer William Hicks, the above named plaintiff, in a plea of the case, whereupon the said plaintiff by M. D. Ives his attorney complains; for that whereas the said defendant did, on or about the twelfth day of July, 1849, at Pleasant township, Monroe c'ty, maliciously, falsely, and openly utter and publish, in the hearing of sundry persons, the following false and scandalous words of and concerning the plaintiff, to wit: 'William Hicks (meaning the plaintiff) will steal, and did steal in Pennsylvania, and had to leave that state for stealing,' which is to the damage of the plaintiff of the sum of \$500, and therefore he sues."

To this declaration the defendant demurred, and assigned for special cause: 1. That there is no sufficient venue; 2. It does not allege in what manner the plaintiff was damaged. The demurrer was sustained, and it is now contended that the court erroneously decided against the sufficiency of the declaration.

Counsel urge as an objection to the declaration, that it is very unlike those which are usually filed in such cases, and that it is defective in the two particulars specified by the special demurrer. In relation to the general objection, it must be admitted that the declaration is remarkable for its brevity, and not in the usual form suggested by most of the authors on pleadings. But in American courts at least, prolixity is no longer regarded as an indispensable branch of pleading, nor is it deemed essential to adhere with venerating tenacity to the verbose forms of ancient pleaders. As conciseness promotes perspicuity, and redundancy leads to ambiguity and doubt, there is surely no propriety in adhering to forms which, when divested of their superfluity of words, become more simple and intelligible. If a declaration or plea contains all the neces-

Hicks v. Walker.

sary legal averments, that is sufficient; the more succinct they are in language the better, if they only express the facts intended.

It is objected to the present declaration, that the venue is not sufficiently stated. But we think otherwise. It is not only stated in the margin, but is also referred to with sufficient identity in the body of the declaration. The abbreviation of "cty." admits of no ambiguity. In its connection with other words, it can only stand for county. This, then, we do not consider a sufficient ground of demurrer.

2. The other objection specified is, that the declaration does not state in what manner the plaintiff was damaged. If the slanderous words charged in the declaration were not actionable *per se*, if they made out a case in which special damages only could be claimed for some particular and actual injury resulting from a slander not actionable in itself, this objection might be urged with much propriety. Chitty's Pl., 347. But by the declaration in this case, general damages only are sought, which are such as the law implies as resulting from words actionable in themselves; and such damages need not be specially averred, because it is a general rule that presumptions of law are not to be pleaded. In this advanced era in the science of pleading, it might very properly be regarded as a loose style, and as censurable surplusage to allege mere matter of law, or any fact which should be officially noticed by the court.

Chitty remarks, that "though it is usual in an action on the case for calling the plaintiff a 'thief,' to state that, by reason of the speaking of the words, the plaintiff's character was injured, yet that the statement appears unnecessary, because it is an intendment of law that the plaintiff was injured by the speaking of such words." Chitty's Pl., 347. It is true that, under this declaration, the plaintiff would be limited to general damages, and could not superadd proof and recover for special injuries. But it alleges all that is necessary to support the action; it states the time,

Rogers v. Alexander.

the place and the injury with such certainty and precision, that the defendant may know what he is called upon to answer, and by an unequivocal plea raise an issue upon which a complete verdict and a certain judgment may be given. When a declaration contains such requisites, and will produce such results, it shows a compliance with the chief object of pleading, and should be deemed sufficient. Besides, the declaration in this case is not altogether without precedent. It appears to have been literally copied from Swift's Digest, 423, a work by no means contemptible, so far as a terse style and methodical arrangement of pleading are concerned.

We conclude, therefore, that the court below erred in sustaining the demurrer to the declaration.

Judgment reversed.

Ives and Summers, for plaintiff in error.

Allison, Wright and Knapp, for defendant.

ROGERS v. ALEXANDER.

Where an agreement was entered into "for the purpose of trial before the justice, and in no other court," such agreement should not be used on trial in the district court, if objected to by one of the parties.

A party is entitled to a jury trial upon an issue of facts, even if those facts had been previously admitted by agreement, or if the party had agreed to submit the case to the court, but had withdrawn that agreement.

A prosecution for selling spirituous liquor in less quantity than one gallon, should be conducted in the name of "The State of Iowa."

ERROR TO VAN BUREN DISTRICT COURT.

pinion by WILLIAMS, C. J. This is a proceeding commenced by plaintiff Alexander, as treasurer of Van Buren county, against Rogers, the defendant, on the statute of 1840, page 25, for selling spirituous liquors in less quantity

Rogers v. Alexander.

than one gallon without license. Judgment was entered by the justice of the peace against the defendant for the sum of \$30, and costs. He took an appeal to the district court. The cause was tried on the appeal, and a judgment entered for the same amount against the defendant, with costs. Defendant took exceptions to the proceedings in the district court. The case was tried by the judge without the intervention of a jury. The proceedings of the court in this trial are complained of as error. The plaintiff in error assigns several errors upon which a reversal of the judgment of the district court is urged. But two of these will be considered as important here. They are as follows, viz.: 1. It was error to refuse the defendant the right of trial by a jury; 2. It was error to assess a fine against the defendant, when the prosecution was carried on in the name of an individual, and not in the name of "The State of Iowa."

On the trial of the cause before the justice, an agreement was filed by the parties, with the expressed understanding that it was "for the purpose of trial before the justice, and in no other court." The agreement is in the following words: "In this case, for the purpose of trial before the justice, and in no other court, it is agreed by the parties that the defendant retailed spirituous liquors in Keosauqua, Van Buren county, Iowa, subsequent to the 1st of January, 1848, and before the date of the commencement of this suit; and that the defendant applied to the board of county commissioners of said county subsequent to the election, on the first Monday of April 1847, and before the commencement of this suit, for license, and that the commissioners refused to grant such license. This agreement was duly signed by the attorneys of the parties, and filed with the papers of the case before the justice. When the cause was called for trial on the appeal in the district court, the attorney for the appellant moved the court for leave to withdraw the agreement from the files, on the ground that by its terms its operation was confined to the trial before the justice, and should not be used for

the purpose of trial in the district court, without the consent of the parties thereto. The leave to withdraw was refused by the court. The defendant's attorney then demanded a trial by jury. Upon this demand being made, the judge directed the clerk to proceed and call a jury for the trial of the cause. Whereupon the attorney for the plaintiff suggested that he had no witnesses by whom to prove the facts relied on for the conviction of the defendant. The court then proceeded without a jury, and gave judgment against the defendant and B. P. Marlow, his security on the appeal bond, for \$30, and costs.

The judgment of the court affirms that of the justice, and is for the penalty under the statute. In the record for the judgment, it is stated that the case was submitted to the court, notwithstanding the bill of exceptions sets forth the fact that the defendant's counsel, before the entry of the judgment, insisted upon a trial by jury as his right. This being the case, as presented by the record, we will proceed to consider it on the two assignments of error as above stated.

The constitution of this state, Art. 2, bill of rights, provides that "the right of trial by jury shall remain inviolate." The proceeding is on a penal statute, by which, on conviction, the defendant became liable to the payment of a fine. The fact to be ascertained was the guilt or innocence of the accused. This fact could be established by the defendant pleading "guilty," or by evidence submitted to the jury of the contrary, upon the issue joined by the defendant's plea of "not guilty." It is true that, in cases of misdemeanour like this, it has sometimes been practice allowable, where the parties consent to waive a trial by jury, for the court to proceed to the hearing and final judgment of the case without the intervention of a jury. This, however, can only be done by consent of the parties, and is then at the option of the judge. But we have not found a case heretofore, in this state at least, where the court refused the accused, in a criminal proceeding, "the right of trial by jury," when claimed and insisted upon before

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judgment, and when the fact in issue was his guilt or innocence. Even after the plea of "guilty" in confession of the accusation has been pleaded, it may be withdrawn, and the accused permitted to enter the plea of "not guilty," and proceed to a trial by jury. In the case at bar, the court has proceeded to judgment, on the ground that the case had been submitted to the judge by agreement of the parties; but the bill of exceptions allowed and certified by the court, certainly shows that if such a submission had been agreed on, it was withdrawn by defendant's counsel in time for the exercise of his right to a jury trial. If the agreement which had been filed for the purpose of trial before the justice were not properly before the court as evidence, and its withdrawal would have worked surprise on the prosecutor, it was in the power of the court, by the exercise of a sound discretion, to give time for the procurement of testimony on the part of the prosecution. By resuming the hearing, after a call of the jury had been directed, when informed that the prosecutor had no testimony to sustain the charge made against the defendant, we think the court erred. By operation of the statute, the case was in the district court for trial *de novo*. The accused had a constitutional right to a jury trial, unless he had waived it by plea or otherwise.

The other assignment of error which it is proper to notice here relates to the parties to the proceeding, and is founded on a provision of the constitution of this state.

This prosecution is criminal in its nature. By it, under the statute, a misdemeanour punishable by fine is charged upon the accused. It was commenced March 21, 1848, nearly two years after the provisions of the constitution were adopted and in force. It could only be proceeded in as prescribed by the constitution. Art. 6, § 6, is as follows: "The style of all process shall be 'The State of Iowa,' and all prosecutions shall be conducted in the name and by the authority of the same." This being a prosecution which was instituted after the adoption of the constitution, it should have been conducted "in the name

Davis v. Fish.

and by the authority of the state of Iowa," and not in the name of the treasurer of the county, Gideon B. Alexander. It is true, the statute on which this prosecution is founded directed this form so far as to designate the treasurer of the county to institute the action. But the constitution is the paramount law, and its requirements must be observed.

Judgment reversed.

H. M. Shelby, for plaintiff in error.

Howell and Cowles, for defendant.

DAVIS v. FISH.

A written agreement between D. and F. stipulated that D. should furnish certain kinds of goods at 25 per cent. and other kinds at 10 per cent. advance, and concluded with the stipulation: "All goods billed at 25 per cent. payable in six months, at 10 per cent. in four months, by adding 10 per cent. interest:" held that the interest should be charged on the goods furnished at 25 per cent. as well as on those furnished at 10.

ERROR TO WAPELLO DISTRICT COURT.

Opinion by KINNEY, J. Davis sued Fish in assumpsit, and declared upon the following contract: "This is to certify that I do agree to furnish E. D. Fish any articles of goods we may have to dispose of, namely, 25 per cent. for all kinds of goods except the following:—sugar, coffee, iron casting, nails, salt, molasses, at 10 per cent. by adding transportation. Flour, corn-meal, whisky, bacon, &c., to be consigned at the lowest cash price, by the quantity, and accounted for when sold. The above articles to be furnished as the said Fish order on memorandum; goods to be delivered at 40 cts per hundred to Eddyville, Iowa. All goods billed at 25 per cent. payable in six months, at 10 per cent. in four months, by adding 10 per cent. interest."

The only question arising in this case is one growing out of a construction of this last clause of the agreement.

The court instructed the jury "that the contract to pay interest was confined to the goods billed at 10 per cent. advance, and that those which were billed at 25 per cent. advance would draw interest by the statute at 6 per cent. after due." Although the concluding part of the contract is somewhat ambiguous, and evidently written in that laconic style which is somewhat peculiar to commercial men, still we think the construction given it by the court is different from what the parties intended at the time. In the construction of all contracts, the great object of the courts should be to reach the intention of the parties. This can sometimes be ascertained from the express language used in the contract, but at other times, words which evidently contradict the general spirit of the agreement must be disregarded, and the meaning of the parties declared without reference to the language used, except as far as it expresses the intention of parties. In the construction of this contract, much is left to inference. All goods billed at 25 per cent., payable in six months at 10 per cent.; that is, all goods billed at 10 per cent. payable in four months.

The adding of the 10 per cent. interest, we think, refers to the entire amount of goods thus billed. The matter would have been placed beyond all doubt, if the words "upon the whole amount" had been inserted after the word "interest;" but the omission is characteristic of the entire contract. The fewest words possible are used by the parties to express their liability. The statute authorizes parties to contract in writing for 10 per cent. interest. It is reasonable to presume that this contract was made with reference to this statute, and that as time was given, it was the intention of the parties to stipulate for that amount, particularly as the contract bears this construction. Davis agrees to furnish Fish with goods. They are to be billed at a certain per cent. above costs, and time is to be given for payment, four months upon one bill, and

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six upon the other. Ten per cent. interest is stipulated, which, we think, taken in connection with the character of the contract, was intended by the parties to apply to the whole amount of goods billed.

Judgment reversed.

Wright and Knapp, for plaintiff in error.

S. W. Summers and H. D. Ives, for defendant.

PARRIS v. THE STATE.

Under the statute of 1849 it is erroneous for a district judge to charge a jury, or to modify instructions orally.

Legal instructions may be refused and given in a modified form in writing, as the circumstances and evidence of the case may require.

ERROR TO DAVIS DISTRICT COURT.

Opinion by GREENE, J. Indictment for suffering gaming. Trial before a jury, a verdict of guilty, and a fine assessed of \$50. The indictment was found under the eighth section of an act to prevent and punish gaming. Rev. Stat., 275. This section provides that if any keeper of a tavern, grocery or other house of public resort, shall suffer any game prohibited by the act to be played at or within such tavern, grocery, &c., or in any outhouse appendant thereto, such keeper shall, on conviction, forfeit and pay a sum not less than \$50, nor more than \$200, &c. The act prohibits all games whatsoever, except games of athletic exercise.

Upon the trial, defendant's counsel asked the court to give certain instructions. Among the instructions the following were asked and refused: 1. The state must prove the game played to be the game charged in the indictment; 2. That the state must prove, to the satisfac-

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tion of the jury, that some game was played by the persons mentioned in the indictment; 3. That in order to convict, they must be satisfied that the game played was not a game of athletic exercise, and upon this they must be satisfied from the testimony of witnesses, and not from anything they may know of themselves. At the conclusion of these and five other instructions asked by defendant, the following note appears over the signature of the judge: "Refused, and others given instead."

But the substituted instructions are not made a part of the record, nor are we informed, except by an unauthorized remark of the clerk, whether they were given orally or in writing. If in writing, they should have been connected with the instructions asked, and made a part of the record under the signature of the court. If orally given, it was in direct conflict with the laws of 1839, p. 135, § 2, which provides, that when instructions are asked by either party, the court shall in no case "orally qualify, modify, or in any manner explain the same to the jury." Under this section instructions asked cannot be orally modified or explained, but they may, no doubt, be explained in writing by connecting such written explanations with the instructions asked, and making all a part of the record. This is wholly neglected in the present case, and we are only informed by the judge that other instructions were given, without any intimation of their character.

It was erroneous to refuse unqualifiedly the three instructions above quoted, still they might with propriety have been refused and given in a modified form in writing, as the peculiar circumstances and evidence of the case might require; but as the record shows an absolute refusal, and no written explanation, the judgment must be reversed, and a trial *de novo* awarded.

Judgment reversed.

Wright and Knapp, H. D. Palmer and A. Hall, for plaintiff in error.

S. S. Carpenter, for the state.

REEVES v. ROYAL *et al*

Where a new trial is sought on the ground of newly discovered evidence, the best proof should be adduced to show that such evidence has been discovered, where it is, that it can be had at the proper time, that it is material, and not merely cumulative, and that a failure to procure it on the trial was not occasioned by negligence.

Where the record shows that the district court granted a new trial on the ground that the instructions were confused and defective, this court will not disturb the order.

ERROR TO DAVIS DISTRICT COURT.

Opinion by WILLIAMS, C. J. Reuben R. Reeves, as administrator of the estate of Levi Reeves, deceased, brought his action of assumpsit against the defendants, Royal and Jackson, in the district court of Davis county, to the April term, 1848. The plaintiff declared upon a joint and several note, payable six months after date, calling for \$110.70. The note bears date the 22d day of August, A.D. 1846. The defendants set up fraud and circumvention on the part of plaintiff in obtaining the note. The cause was tried at April term, 1848, and a verdict rendered for the plaintiff for \$118.62. Upon the recovery of the verdict, the defendants moved the court to grant a new trial. On hearing, the verdict was set aside and a new trial granted. This action of the court is here assigned as error.

The record shows that the motion for a new trial was urged on two grounds, to wit: newly discovered evidence, and error in the instructions of the court, so as to mislead the jury in making up their verdict.

The affidavit of Royal, one of the defendants, was filed, on which he stated that since the trial he was informed one Denison, who was then absent, would testify that said plaintiff, Reuben R. Reeves, stated to witness, "that they (meaning plaintiff and Green Reeves) had a hard time to get old Royal into it," (meaning the note sued.)

The affiant does not pretend in the affidavit to disclose the name of the person who informed him of what Denison would swear, nor does he aver his belief in the statement made. The affidavit does not show that, in the use of proper diligence, the testimony of Denison could not have been procured on the trial.

So vague and indefinite are the allegations of fact contained in the affidavit, that of itself it does not present sufficient ground for granting a new trial. Indeed, it does not appear to have been considered by the judge who tried the cause as furnishing the reason upon which he acted in granting the motion.

Where a party seeks to procure a new trial on the ground of newly discovered evidence, he should give the court the best evidence possible of the truth of the allegations that such evidence has been discovered, where it is, and that it can be had at the proper time. It is also necessary to show that the evidence is material to the issue between the parties, and is not cumulative merely; and further, that the failure to produce it on the trial was not chargeable to his own negligence. *Shlenker v. Risley*, 3 Scam., 486. In this case we think the doctrine is truly set forth. But enough has been said upon this point, as the action of the district court in granting the new trial appears by the bill of exceptions to have been predicated upon the misdirection of the judge in charging the jury.

It appears by the bill of exceptions that the judge charged the jury on the question of fraud in the procurement of the note upon which the suit was instituted. In his charge, as at first given, there is manifest error. After having charged fully upon the question as raised by the pleading, and the facts adduced in evidence, upon being requested by the defendant's counsel to give a different instruction as to the law, he expressed himself as dissatisfied with what had been given, and proceeded to give those asked. The instruction last given is correct.

The defendant's counsel urged as a reason for granting

a new trial, that the jury was confused and misled as to the law by the charge of the court as given; that the instructions were erroneous, contradictory, and calculated to perplex the jury.

The bill of exceptions then, in the language of the court, proceeds in setting forth, that "the court being of this opinion, and thinking that the suing on the note was a ratification in law (of the agent's acts), and that the jury ought to have been so expressly and clearly charged, and thinking that the case went to them under such confused instructions that they might be misled, &c., granted the new trial."

This record exhibits to us nothing that calls for this court to interfere with the ruling of the district court. It is true that the bill of exceptions shows that, after much discussion of the questions involved in the trial, the court admitted its own error and corrected itself. But it also shows that the court, in the exercise of a sound discretion, with a full knowledge of all the circumstances, was of the opinion that the jury were confused and misled by the charge. This is not a case in which, as good reason for a new trial, it is alleged on behalf of a losing party, that the jury were misled or confused by the instructions of the court, and the motion overruled. But where the court, in express terms, admits the truth of the allegations made as the ground of the motion, and granted a new trial, we cannot interfere.

The court must be presumed to have been fully possessed of the circumstances of the case, and to have acted with a sound discretion in correcting, in a speedy and proper manner, its own erroneous procedure.

The order of the district court granting a new trial is affirmed.

Judgment affirmed.

Wright and Knapp, for plaintiff in error.

A. Hall, for defendant.

Brown v. Scott.

BROWN v. SCOTT.

An appeal is authorized from the judgment of a justice, and not from the verdict of a jury.

The intention of a justice to render a judgment without doing so, is not a judgment.

The certificate of an ex-justice of the peace, in relation to his proceedings while in office, is not entitled to legal consideration.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by KINNEY, J. Brown sued Scott in an action of replevin, which on change of venue was tried before Joseph A. Kean, Esq. The cause was tried by a jury, who found a verdict for the plaintiff. Scott appealed. Brown moved to dismiss the appeal, because there was no judgment of the justice of the peace before whom the cause was tried, from which the defendant could appeal.

The defendant therefore suggested a diminution of the record in this, that the transcript of the justice did not show a judgment upon the verdict. A rule was obtained upon the justice and his successor in office, commanding them to send up to the district court their joint and several certificates, setting forth distinctly the judgment in the case. In pursuance of this rule, John McCansland, Esq., the successor of said Kean, filed a transcript from the docket of said Kean, in which it appears that there was not any judgment entered up by his predecessor in office against the defendant Scott. Kean, in obedience to said rule, returns as follows: "In the above case, I, Joseph A. Kean, the justice before whom the same was tried, do hereby certify, that I rendered judgment therein in accordance with the verdict of the jury; and that it does not appear on my docket and the transcript sent to the district court, arises from the fact, that it was a clerical omission of mine."

The motion to dismiss was then heard and overruled by the court, and the cause retained for trial, to which ruling Brown excepted, and assigns the same for error.

This ruling of the court was erroneous. The statute in relation to jury trials before justices of the peace provides, that when the jurors have agreed on the verdict, they shall deliver the same to the justice publicly, who shall enter it on his docket. Rev. Stat., 325, § 15. It is then the duty of the justice of the peace to enter up judgment upon the verdict against the unsuccessful party.

The statute also provides, that any person aggrieved by any judgment or decision of a justice of the peace, may make his appeal therefrom to the district court, &c.

A person cannot appeal from the verdict of a jury. In cases of jury trial where the verdict is really the cause of complaint, it is still the judgment of the justice upon the verdict, which alone under the statute gives the party the right to appeal. If there is not any judgment, there is nothing to appeal from, nothing for the district court to try, no cause in court which entitles the appellant to a trial; and, therefore, in such a case, unless an amended transcript supplies this fatal defect, the appeal on motion should be dismissed.

But the court, in the case before us, appears to have adopted the certificate of Kean, the justice, before whom the cause was tried, but who was not in office at the time of certifying, and by virtue of this certificate retained the appeal for trial.

From it, it would seem that the justice rendered judgment, but failed to enter it in writing. We are at a loss to know how the justice could have rendered a judgment that would have any force or virtue, without rendering that judgment into proper form in the docket, which he is required by law to keep for that purpose. It is true, he might in his mind resolve upon entering the judgment, but unless put into shape and form, it would be as though no judgment at all had existed in the mind.

This certificate, even if Kean had remained in office, should not have been received by the court. The *act* of the officer and not the *intention*, is what gives force and authority to judicial proceedings.

Phillips v. Cooley.

However much Kean may have intended to enter the judgment, if he did not do it, for the purposes of appeal it is the same as though no trial had taken place. Officers cannot supply acts by will, nor give vitality to judgments which only existed in the mind.

But when Kean retired from office, his certificate in relation to former official proceedings was not entitled to any more legal consideration or respect than if he had never been a justice of the peace, or than that of a mere stranger. His docket by the statute passed into the possession of his successor, and transcripts from it could not be explained, changed or in any way altered by the certificates of the justice who once entered them.

Judgment in the district court upon the trial of this case reversed, and the appeal dismissed.

Judgment reversed.

A. Hall, for plaintiff in error.

Wright and Knapp, for defendant.

PHILLIPS v. COOLEY.

Where a note is made payable in corn on or before a given day, a demand is not necessary.

Where no place is appointed for the delivery of specific articles, the debtor must, before the day of payment, ascertain from the creditor, if practicable, where he will receive the goods.

ERROR TO MARION DISTRICT COURT.

Opinion by GREENE, J. An action of assumpsit on a note, by which Samuel M. Cooley promised to pay Jacob Phillips 200 bushels of good corn, on or before the 1st day of December, 1848. Suit commenced before a justice of the peace, where the defendant recovered a

judgment. The plaintiff took an appeal to the district court, and there, on the trial, offered the note in evidence to the jury, but the defendant objected to the introduction of the note, on the ground that the plaintiff had not proved a demand of the corn previous to the commencement of the suit. This objection was sustained, and the plaintiff, neglecting to prove a demand, was nonsuited, and now urges this ruling of the court as error. The only question involved in this case has already been decided by this court in the case of *Games v. Manning*.^{*} In that case, the note was payable in leather at a time and place specified; and it was held that the plaintiff was entitled to his action without proving that he had demanded the property. The fact that no place was designated in this case for the payment of the corn, cannot change the rule in relation to a demand. Independent of the statute, it is a well settled rule, that where no place is appointed for the delivery of specific articles, the debtor must, before the day of payment, ascertain from the creditor, if practicable, where he will receive the goods. *Burr v. Myers*, 3 Watts & S., 295; *Bixby v. Whitney*, 5 Greenl., 192; *Carrier v. Carrier*, 2 N. H., 95; *Howard v. Miner*, 20 Maine, 325. According to this doctrine, the first act is to be done by the debtor, if he wishes to avail himself of the privilege to pay his liability in property, and this can hardly be reconciled with the position that the creditor must first demand the specific articles before seeking to recover his demand.

Besides, the course to be pursued by the maker of any instrument of writing is defined by statute in all cases where such instrument does not specify any particular place for the payment or delivery of the property. It provides that it shall be lawful for the maker of any such instrument to tender, on the day of payment, the specific articles at the place where the obligee or payee of any such instrument resided at the time of the execution thereof. Rev. Stat., 453, § 7. This certainly contemplates no pre-

^{*} Ante, 251.

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vious demand on the part of the payee or obligee. If required, that regulation of the statute would prove utterly fallacious. A demand necessarily implies the power to deliver the article specified at the time and place of the demand, and this would enable the maker of such an instrument to deliver the property at such place as might be most convenient to him, without reference to the rights and convenience of the payee. But it is useless to enlarge upon this subject, as we adhere with confidence to the decision and views expressed in *Games v. Manning*.

Judgment reversed.

W. H. SeEVERS and *L. W. Babbitt*, for plaintiff in error.

S. W. Summers, for defendant.

WRIGHT v. BOON.

A judge cannot act as attorney in a case pending before him.

When a case comes before a judge, in which he has been engaged as attorney, he should order a change of venue.

A judge cannot delegate his power to another, nor can a person be authorized to act as judge by agreement of the parties to a suit.

ERROR TO POLK DISTRICT COURT.

Opinion by KINNEY, J. Boon sued Wright before a justice of the peace upon two promissory notes, one for \$53.33, the other for \$34.87.

The case was tried by a jury, and a verdict returned in favor of the defendant for \$83.22. The plaintiff appealed to the district court of Dallas county, and by change of venue, the cause was removed to the district court of Polk, where it was tried, and a verdict of \$57.50 found for Boon. Wright then filed his motion to set aside the verdict, for the following reasons: Because William

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McKay, judge of the fifth judicial district of the state of Iowa, appeared as counsel for William D. Boon; and also the said judge signed the instructions written and given by W. W. Williamson, who presided as judge in the cause. This motion was overruled, and judgment entered upon the verdict. Whereupon Wright sued out a writ of error, and assigns as error:

1st, The court erred in acting as counsel and judge in the same case.

2d, The court erred in overruling the motion to set aside the verdict and grant a new trial.

The following agreement appears of record: "Now come McKay and Jewett, attorneys for plaintiff, and Cassady and Perry, attorneys for the defendant, and by agreement of parties heretofore made, W. W. Williamson, Esq., presided in the case instead of the Hon. William McKay, who was one of the counsel before he was elected judge." The record, we think, sufficiently discloses the fact that his honor Judge McKay acted as counsel in the court of which he was presiding and sole judge.

He, as counsel, is party to the agreement by which a member of the bar is substituted as judge. A motion is made to set aside the verdict, in which it is stated, that the judge acted as counsel, and nothing is shown to rebut this charge. The question raised by the assignment of errors is, Can parties substitute a person to act as judge in the place of the judge, and can the judge act as counsel in a cause in his own court? By the statute, it is provided that in all cases where the judge is interested or prejudiced, or is related to, or shall have been counsel for either party, the court shall, in term time, without application from either party, award a change of venue. Rev. Stat., p. 639, § 5. Judge McKay having been counsel in the case before his election as judge, he should have ordered a change of venue as required by this statute. Parties cannot agree, even with the consent of the judge, to depose the court and substitute another to act as judge in the trial of causes. The bench cannot in this way be vacated,

Dickerson v. Shelby.

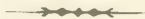
nor the powers of the court thus delegated to another. Williamson possessed no more authority upon the bench than before he occupied the seat. Nor was it within the power of the court to confer upon him the stipulated judicial authority. The judge alone was endowed by law with the duties and responsibilities which pertain and belong to the court; and if these are assumed by another, or attempted to be conferred by the court or parties, all proceedings emanating from such assumed or enforced authority will be absolute nullities, and should be declared void whenever attempted to be enforced. This being the case, the impropriety of the judge leaving the bench, and appearing as counsel in a cause on trial in his own court, is perfectly apparent—a judicial indiscretion which inexperience may palliate, but an error sufficient to reverse any judgment thus obtained.

The court therefore erred in refusing to set aside the verdict. The judgment of the court below is reversed, and a trial *de novo* awarded.

Judgment reversed.

J. M. Perry, for plaintiff in error.

Jewett, Wright and Knapp, for defendant.



DICKERSON v. SHELBY.

Clerks of the district court are entitled to fees before losing control of their service.

Fees for making out a transcript may be required before the case is docketed in the supreme court.

ERROR TO VAN BUREN DISTRICT COURT.

Opinion by GREENE, J. A motion is made in this case for a rule upon the clerk of the Van Buren district court to send up the record in obedience to the writ of error.

But it is contended that the motion should not be granted because the plaintiff in error has not paid the clerk's fees for making the transcript of the record. The question arises, Was the clerk entitled to those fees before losing control over the transcript? We think this case forms no exception to the general rule in relation to fees. Independent of the prevailing practice which secures compensation to officers of courts whenever they are rendered, we have a statute which provides that all fees shall be paid by the party requiring the services, on the same being rendered. Rev. Stat., 222, § 4. If, then, a clerk of court requires his fees upon rendering any service for a party, he cannot be required to place those services in the possession of such party until he receives payment for them. It is true, a writ of error is a writ of right; it is a mandate which should be promptly obeyed in behalf of the party for whose benefit it issued; but still it is not a writ requiring gratuitous service. Although it will issue "as of course" upon any order or judgment of a district court, still the clerk who issues it is entitled to his fees for it before he can be required to let it pass from his hands, and upon the same principle the clerk below, to whom the writ is directed, is entitled to his legal fees for preparing the returns thereto; and if payment is required, it should be made by the plaintiff in error before the papers are filed and docketed in this court. Where such preliminary payment is demanded by the clerk below, he should give notice thereof to the plaintiff or his attorney, and send his bill of particulars and demand of payment with his returns in the case, to the clerk of this court, and authorize him to receive the fees for him; and when such bill and declaration accompany the papers, the clerk of the supreme court will not file the papers or docket the case until payment is made. This rule, we think, is conformable to the spirit of the statute, will insure imperative obedience to writs of error, and secure the clerks below in the collection of fees which might otherwise be lost. It will be seen that the clerks of the district courts, under this

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arrangement, are required to obey the writ of error, and make returns as provided by statute, whether his fees are previously paid or not.

The motion is granted conformable to this opinion.

J. H. Cowles, for plaintiff in error.

H. M. Shelby, for defendant.

DE FRANCE v. SPENCER.

Ordinary caution and honest motives in setting fire to a prairie, and due diligence in preventing it from spreading, is a good defence to an action for damages.

ERROR TO JEFFERSON DISTRICT COURT.

Opinion by KINNEY, J. Spencer sued De France and Karns before a justice of the peace for damages sustained by reason of a fire which he alleged was set out by the defendants, and by them permitted to communicate with his premises. Before the justice the defendant in error obtained a judgment from which the defendants below appealed. In the district court a verdict was returned by the jury against De France for \$20. To reverse the judgment upon this verdict he has sued out a writ of error, and assigns for error the following instruction of the court: "He who voluntarily sets out fire on his own land is responsible for the damages done by its spreading upon the lands of others, even though he uses due diligence to restrain it."

This instruction was erroneous. The statute relied upon to sustain the instruction provides, "That if any person or persons shall set on fire, or cause to be set on fire, any woods, prairies or other grounds whatever, other than his own, or shall permit the fire set out by him to pass from

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his own prairie or woods to the injury of any person or persons, every person so offending shall, on conviction thereof, for every such offence be fined in any sum not exceeding \$50, and shall be liable to an action to the party injured for all damages which he, she or they may have sustained in consequence of such fire." Laws of 1846, p. 3, § 1.

Aside from this statute, it would not be contended that a person would incur liability for damages sustained by fire passing from his own premises if he had used proper caution and diligence in preventing it. This principle is fully sustained in *Clark v. Foote*, 8 John. R., 421; *Bachelder v. Hagan*, 6 Ship., 32; *Ellis v. Railroad Co.*, 2 Irdele, 138.

Does our statute change this rule, and make an individual responsible for damages done by fire passing from his own premises, when it was not within his power to prevent it? We think not. The meaning of the statute is, that a person shall not willingly or carelessly permit or suffer the fire to pass so as to injure another, or if he does that, he should be liable to the party injured. If a person does all in his power to prevent the fire from passing, but if, in opposition to all of his efforts, it still passes on to the premises of another, he does not, in contemplation of the statute, *permit* it to pass. It encroaches upon his neighbor against his best efforts, without his consent or permission, and he should not be held liable for any damages which it may occasion. While a person has a right to set fire to his own grounds, yet if he does so when, from their contiguity to those near him, or from high wind or other cause, the result would lead to mischief, in such case he would be liable if injury is done to his neighbor's property, because he could not exercise diligence to prevent the fire with that success as if the fire had been prudently set out. But when, from good motives, and under prudential circumstances, a person sets fire to his prairie or woods, and uses such care and diligence to prevent it from spreading as a man of ordinary caution would use to

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prevent it from injuring his own property, he is not liable for the damage which it may do to the premises or property of others.

Ordinary prudence and honest motives in setting the fire, and due diligence in preventing it from spreading, are all that is necessary, and will constitute a good defence to an action for damages.

Judgment reversed.

Slagle and Acheson, for plaintiff in error.

C. Negus, for defendant.



SHAFFER *et al.* v. TRIMBLE *et al.*

Where a party before a justice of the peace moves for a continuance of the cause, and for a change of venue before objecting to the summons, such acts will amount to a general appearance, which cures all defects in the form and service of process.

ERROR TO APPANOOSE DISTRICT COURT.

Opinion by GREENE, J. An action of trespass commenced before a justice of the peace by the plaintiffs in error. We infer from the very defective transcript in this case, that on the return day of the writ the parties appeared, and the plaintiffs filed their affidavit for a continuance, on the ground that witnesses could not be had in time for trial. The defendants admitted the facts which the plaintiffs expected to prove by those witnesses, and claimed that the trial should proceed. The defendants thereupon made application for a change of venue, which was accordingly granted, and then moved to dismiss the proceedings, for the reason that the amount of damages claimed by plaintiffs, including interest and costs, was not indorsed upon the summons as required by statute. Rev. Stat., p. 317, § 15. This motion was overruled.

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The defendants submitted to a trial upon the merits, before the justice to whom the venue was changed. Verdict and judgment for the plaintiffs.

An appeal was then taken to the district court, where the defendants renewed their motion to dismiss, which was granted.

The question is now presented, Did the court below err in dismissing the suit on the ground that the amount of plaintiffs' claim was not indorsed on the summons? This defect would justify such a decision, where the objection is not waived by the general appearance of the defendants. The transcript in this case shows such appearance before any objection was made to the indorsement. The defendants appeared, and on the affidavit made for a continuance, admitted certain facts to be true, and demanded a trial. Again they appeared and applied for a change of venue before the motion to dismiss first appears to have been made. It is a well settled rule, and one which has been repeatedly confirmed by this court, that the appearance of a defendant cures all defects in a summons, or in the service of process. *Morris*, 21, 113, 223, 403; 4 *Blackf.*, 137; 5 *ib.*, 97. Besides, the defendants waived this objection by availing themselves of a change of venue, and by going to trial before the second justice without making any objection before him to the indorsement on the summons.

The decision of the district court in dismissing the suit is therefore reversed, and the cause will stand for trial in that court upon the appeal.

Judgment reversed.

W. H. Brumfield, for plaintiffs in error.

S. W. Summers, for defendants.

Hall v. Bennett.

HALL *et al.* v. BENNETT.

Where a party appeals from a judgment by default, he may on first appearance in the district court object to the manner or style in which he is sued. Where there is a manifest variance between the names to a note and the names to a record, the note should not be admitted in evidence.

In a suit commenced before a justice of the peace, a misnomer may be taken advantage of by motion, as well as by plea in abatement.

ERROR TO POLK DISTRICT COURT.

Opinion by GREENE, J. This was an action of assumpsit commenced before a justice of the peace, in the name of B. Bennett against S. Hall and B. F. Jesse. A judgment by default was rendered against the defendants. They then took the case to the district court by appeal, and there moved to dismiss the suit because they were not sued by their Christian names nor even by proper initials. This motion was overruled, although it appeared that the suit was commenced and prosecuted against S. Hall and B. F. Jesse, instead of against Townsend Hall and Benjamin Jesse. The defendants then objected to the admission of a certain note which the plaintiff offered in evidence, because the note was in no way referred to or identified in the proceedings before the justice, and in no way appeared to be the instrument upon which the cause of action was predicated. But the court overruled this objection, and admitted the note in evidence. In both of these particulars, the ruling of the court below was obviously erroneous. Upon their first appearance to this action, the defendants objected to the defective manner in which they were sued. It cannot, therefore, be assumed that the irregularity was waived by appearance. Had they been sued upon a note to which the initials only of their Christian names had been subscribed, there might have been some justification for the decision of the court below. They might then have been sued in a name which they had themselves acknowledged. But in this case, there

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was no note adduced signed in the name of S. Hall and B. F. Jesse, and payable to B. Bennett. The note offered in the district court, and improperly admitted, was signed by Townsend Hall and Benjamin F. Jesse, and made payable to Benjamin Bennett. Thus the misnomer in the suit was manifest, and in an action commenced before a justice of the peace might be taken advantage of on motion, as well as by a plea in abatement. The variance between the parties to the note and the parties to the suit is equally manifest, and rendered the note inadmissible as evidence, even if the transcript had shown that this note constituted the same cause of action upon which the judgment of the justice was rendered. Rev. Stat., p. 335, § 15.

Judgment reversed.

W. H. Seevers, for plaintiff in error.

J. M. Perry, for defendant.



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In the district court all writs should be made returnable to the first day of the term, but if a writ is defective in this particular, it may be corrected by the court, or cured by the appearance of the defendant. If a writ of attachment is made returnable to the third day of the term, it is doubtful whether it would justify the court in dissolving the attachment lien.

ERROR TO WAPELLO DISTRICT COURT.

Opinion by GREENE, J. This case is now before us on petition for rehearing. The case, as first tried, is reported in 1 G. Greene, 405. It is now claimed that the judgment of the court below was improperly reversed, as there was a material defect in the writ of attachment which was not amended, and which justified the action of the court below

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in dissolving the attachment and dismissing the writ. The defect to which our attention is now directed for the first time is, that the writ of attachment was made returnable to the third instead of the first day of the term, as is directed by statute. Rev. Stat., p. 468, § 1. It appears that the summons was made returnable in the same irregular manner. But the court decided that the attachment was defective, and the summons good. Even that of itself would justify the former action of this court in reversing the judgment, for if the defect complained of would invalidate the one writ, it would necessarily have the same effect upon the other. But the irregularity was such that it might have been corrected in both writs by the court, or cured by the appearance of the defendant. If the defect in the summons was waived by such appearance, the defect in the writ of attachment was waived by the same act; for an appearance to the action could not but be regarded as an appearance to both writs. Besides, it may well be questioned whether such an irregularity could justify a court in dissolving an attachment lien, if good in all other particulars, even if the objection had been made in time. It was a mere defect in form, amendable on terms discretionary with the court, and which could not impair the authority of the officer or the validity of his levy, nor work any inconvenience to the party. But if the defendant had not appeared, the court would not have been authorized to render judgment against him on such attachment before the third day of the term, as mentioned in the writ. We therefore see no reason for disturbing our former decision in this case.

Judgment reversed.

Wright and Knapp, for plaintiff in error.

H. B. Hendershott, for defendant.

Steel v. Davis Co.

STEEL v. DAVIS CO.

An action may be maintained against the commissioners of a county, on a general unconditional order drawn by them for the payment of money. The rule that an order must be presented for payment within a reasonable time, and notice of its dishonor given to the drawer, is not applicable to county orders.

ERROR TO DAVIS DISTRICT COURT.

Opinion by GREENE, J. Samuel Steel sued the board of commissioners of the county of Davis, in an action of debt on a county order under seal. The order was drawn by the commissioners of said county, tested by their seal and clerk, and directed the treasurer of Davis county to pay Samuel Steel, or bearer, \$900, with 10 per cent. interest; the interest to be paid semi-annually. Date of order, April 11, 1848; presented for payment, July 2, 1849, and payment refused. To the declaration the defendant demurred, and the demurrer was sustained. Upon this decision, the plaintiff brought the case by writ of error to this court. The only question raised is, Can an action be maintained against the county commissioners on a general order drawn by them for the payment of money?

The power of the county commissioners to issue such attested orders is not denied; but it is contended that the holders of such orders cannot maintain an action upon them; that they are only entitled to payment in the order of their acceptance, so fast as the money comes into the county treasury; and that the commissioners can only be sued where they exercise a power not conferred, or refuse or neglect to perform a duty enjoined, by law. By statute, the county commissioners are considered a body corporate and politic, and, as such, "may sue and be sued, plead and be impleaded, defend and be defended, answer and be answered unto, in any court either in law or equity." Rev. Stat., 123, § 4. Among the powers delegated to them by

that section, we find that they are authorized to examine, allow and settle all accounts of the receipts and expenditures of the money of the county, and have the care of the county property, and management of the county funds and business. It must be presumed that the order in this case was drawn pursuant to the authority conferred upon the commissioners to examine and allow accounts; and as it was not made payable upon any contingency, or out of any particular fund to be created, but made unconditionally payable on presentment to the treasurer, it became at once due upon such presentment. It has been decided by this court, in *Brown v. Johnson Co.*, 1 G. Greene, 486, that a judgment may be rendered against county commissioners upon a county order due at the time suit was instituted. If a judgment may be rendered against them on such an order, it necessarily follows that a suit may be instituted upon it, and the action legally maintained.

Whenever the board of commissioners are in default, whenever they neglect to perform their contracts or to pay their liabilities, redress may be sought against them by the injured party in the same way that it may against any other body corporate which is authorized by law to sue and be sued. By the unqualified language of the order in this case, the commissioners direct payment unconditionally, and thus in legal contemplation undertake that funds are in the hands of the treasurer to pay the same on presentment. They control, limit or extend county expenditures, have charge of the county property, and the procurement and management of the county revenue. It is, then, their duty to keep the county expenditures within the resources which may legally come under their direction; and it is especially their duty to provide means for the payment of all liabilities contracted by them in "transacting county business." If they fail in any of their contracts or undertakings, the injured party can seek redress by instituting his suit against them. The very authority which enables them to contract within their defined powers, and to sue in any court, provides that they may

be sued. This liability to be sued is not limited to any particular delinquency in the discharge of their duties, but extends generally to all wrongs by which the rights of others may be affected. This we regard as the obvious intention of the act organizing a board of county commissioners in each county.

The declaration in this case contained all necessary allegations to enable the plaintiff to recover. It shows that the order was presented to the treasurer, that payment was demanded and refused. The commissioners having failed in their undertaking to have the funds ready, the action against them was clearly maintainable.

The fact that the order was made to draw interest at 10 per cent., to be paid semi-annually, cannot be considered as an extension of the day of payment to an indefinite period, as is claimed by counsel. It is a positive order upon the treasurer to pay the money, with 10 per cent. interest from date until paid, and to pay the interest semi-annually. Thus it was left discretionary with the holder of the order to demand the principal at once, or to retain the order and collect the interest semi-annually, until he chose to present it for the principal. The drawers of the order being so intimately connected with the drawee as to create and control the funds in his hands, the rule that it must be presented within a reasonable time, and notice of its dishonor given to the drawer, would not be applicable to this case. It has been held that such notice is not necessary where the drawer and acceptor are partners. *Rhet v. Poe*, 2 How. U. S., 457; *Gowan v. Jackson*, 20 John., 176. The connection between the commissioners and treasurer of a county is at least as intimate as that between copartners, and may, with great propriety, come under the rule. An order drawn by the commissioners upon the treasurer, is in effect the same as an order drawn by the county upon itself, to be paid under the direction of one officer by another; the same as one made by an individual upon himself, and to be paid by his agent or clerk at the depository of his funds, and thus may be regarded

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more like a promissory note than a bill of exchange. Chit. on B., 28; *Varner v. Nobleborough*, 2 Greenl., 125. Regarding the order in this case in effect the same as a promissory note, the maturity of the indebtedness and the immediate liability of the county to a suit upon it, cannot, we think, be questioned.

The case of *Hasey v. White Pigeon Beet Sugar Co.*, 1 Doug., 193, has much analogy to the one at bar. In that case the body corporate, by its president and secretary, gave an order upon its treasurer to pay K, or bearer, a certain sum of money. The form of the order was in substance the same as the one in this case; and the incorporation was rendered liable to be sued to no greater extent than our counties are, and still the right to sue that incorporation upon such an order was not for a moment questioned, and it was held that the order was the same in effect as a promissory note; that "it must be understood to be a promise to pay the amount presently, an acknowledgment of an immediate and unconditional indebtedness, for which the plaintiff had a right to bring his suit at once."

Apply the analogies of that case to this, and it appears manifest that the demurrer to the declaration was erroneously sustained.

When the county commissioners desire to avoid the immediate liability of a suit upon county orders, it is an easy matter for them to do so, by expressing the intended condition or period of payment in the order itself. If to be paid out of funds yet to be raised, and not otherwise appropriated, it should be so expressed. If no such condition or qualification is named in an order, it follows, as a legal consequence, that it is due and payable on presentment.

Judgment reversed.

D. P. Palmer and *A. Hall*, for plaintiff in error.

H. M. Shelby and *S. G. M'Achran*, for the county.

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT OF THE STATE OF IOWA,

IOWA CITY, JUNE TERM, A.D. 1850,

In the Fourth Year of the State.

Present:

HON. JOSEPH WILLIAMS, *Chief Justice.*
HON. JOHN F. KINNEY, }
HON. GEO. GREENE, } *Judges.*

HALL v. WASHINGTON CO.

Where an attorney is appointed by the court to defend a pauper prisoner, the county is liable for his fees,

Whicher v. Cedar Co., 1 G. Greene, 217 ; overruled

ERROR TO WASHINGTON DISTRICT COURT.

Opinion by WILLIAMS, C. J. John C. Harriman was indicted for murder in the district court of Washington county. He was tried and convicted. A writ of error was sued out on his behalf. The case was tried at the June term of the supreme court at Iowa city, and the judgment of the district court reversed. When the cause

was called for trial in the supreme court, the prisoner applied for the appointment of a suitable person to act as his attorney and counsellor. Whereupon the court, in compliance with the statute, appointed and directed J. C. Hall, Esq., to attend to his case as attorney and counsellor, and his services were rendered accordingly. Mr Hall, after the trial and judgment, obtained of the court a certificate of his appointment, the services rendered, and that \$100 was a reasonable charge for them. He soon after presented his bill for the \$100, accompanied by the certificate of the supreme court to the board of commissioners of Washington county, at their session for allowance. The commissioners refused to allow it, and entered their decision to that effect. An appeal, in compliance with the statute, was taken from the commissioners' court to the district court of the county. At March term of the district court, the cause was tried, and judgment rendered against the plaintiff Hall for costs of suit, on the ground that the county was not legally liable to pay for services so rendered.

The only question for decision here, is, as to the county of Washington being liable for the services of the attorney rendered in pursuance of the requirement of the statute in this case. The statute (Rev. Stat., 155, § 64) provides, that "The court shall assign counsel to defend the prisoner, in case he cannot procure counsel himself." It was upon this statute the court acted, being satisfied that Harriman was a pauper, and unable to procure counsel for himself. The question has been heretofore adjudicated by the supreme court of this state. *Whicher v. Cedar County*, 1 G. Greene, 217. The judgment of the court was then given by a mere majority of the judges, one dissenting, and adverse opinions were delivered. It certainly is the great design of government, and it should be the aim of the judges to administer the law as it is, that its end—the establishment of right—may be secured. In accomplishing this task, which is often difficult, minds enlightened, and of the purest intention, will differ in the

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conclusion. It is also true that, whilst the establishment of right between man and man is the paramount object of law, it is highly important that, as a rule of action, it should be fixed and certain, so that it may be known and observed by those who are required to be subject to it. A decision made by the supreme court of the state should not be reconsidered and reversed upon doubtful ground, or little consideration. However, where the principle decided has a direct and important bearing on the question of right, in view of the essential and permanent interests of community, it is the duty of the court, regarding its own responsibility, upon due occasion, to review its former decisions with care and candor. This being done, if convinced and satisfied of error in the former decision, private and public interest, as well as justice to the court itself, require that its judgment should be corrected. In a court of last resort, this is the only mode of correction.

It is quite probable that the district court, in deciding the case at bar, was governed by the case of *Whicher v. Cedar County*. The judgment is in accordance with the doctrine of that case. But we cannot coincide with the majority of the court in maintaining the doctrine there expressed by them.

The prisoner Harriman was a pauper, unable to procure counsel for himself on trial before the supreme tribunal of the state, for the highest offence known to the law; his life at stake upon the issue, he threw himself as a citizen upon the provision of the law of his country, for the aid and protection which it guarantees to every citizen, when arraigned before the proper tribunal for trial.

His complaint was, that in the proceedings of the district court, which had resulted in his conviction, there was error; that he had not been convicted by the due course of the law of the land. He claimed the right of a citizen of Washington county, under the law of the state, to have counsel in conducting his case before the court, being unable to procure that counsel for himself. Without disre-

garding the law of the state, the court could not deny him this right. *Vide* Rev. Stat., 155. Mr Hall was duly appointed. He acted by authority of the court. The court acted in obedience to the express mandate of the statute. Here, we think, is a case of statutory obligation, fixing a liability on the proper county to pay for the services of the attorney. The service rendered was not voluntary on the part of the court or the attorney, but it was in obedience to law. The court was bound to comply with the requirement of the statute; and the attorney, as an officer of the court, could not refuse to act. Where an act of service is performed in obedience to direct mandate of statutory law, under the direction of a tribunal to which the enforcement of that law is committed, reasonable compensation to the person who performs that service is a necessary incident; otherwise, the arm of the law will be too short to accomplish its designs. If attorneys, as officers of the court, have obligations under which they must act professionally, they also have rights to which they are entitled, and which they may justly claim in common with other men in the business of life. Among these rights, that of reasonable compensation for services rendered in their profession is justly to be considered. The exercise of judicial power, in order to effectuate the common and statute law, frequently becomes necessary, and must exist incidentally. By virtue of such power, auditors, commissioners, masters in chancery, &c., are appointed and act, and proper compensation is awarded to them. All the officers of the court are recognized as being on just consideration entitled to fees for official services performed. All that has been done by the law is merely to limit them in amount. Why should the attorney at law be made an exception to this general principle? We see no good reason for it. His time, labor and professional skill are his own. He should not be required to bestow them gratuitously at the will of the court, any more than should any other officer. But it is enough here to say that, whilst the statute requires the court to appoint counsel in a case

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like this, it is silent on the subject of pay for his services. It leaves that matter to be disposed of upon the principles of the practice of the common law. There certainly is no legal exception as to an attorney, so as to distinguish his case from any other functionary. In deciding the case of *Whicher v. Cedar Co.*, the court took the ground, "that there is no statute providing for compensation for services rendered in such cases. If the board of county commissioners choose to compensate an attorney for such services, we see no objection. But this is a matter left to their discretion." We cannot see how this position could operate in denial of the plaintiff's right of action. It seems to be admitted there, that the attorney was entitled to pay for his services. That the commissioners had proper authority to allow his fees; but it is decided that they might make the allowance or not, in their discretion. This, we think, is untenable. If the attorney was entitled to his compensation, under the law, and if the commissioners were authorized to pay him for his services, they had and could exercise no discretionary power. They are officially existent only by operation of the statute law. They could only act under its authority. In this case, the right of an action in the plaintiff does not arise from an express contract; but it is necessarily given by the statute. The statute authorizes the appointment of counsel, in defence of a pauper when accused of crime, in view of the right of that counsel to compensation for the service rendered, in obedience to that law, as an incident necessarily attaches a liability for the services to the county which is properly chargeable with the maintenance of the proceeding. This view of the case is sustained by the supreme court of Vermont. *Wolcott v. Wolcott*, 4 Vt., 37; *Vermillion Co. v. Knight*, 1 Scam., 97.

In the case of *Whicher v. Cedar Co.*, the court adverts to the necessity of legislative interference in order to provide for compensation of this kind. We are of the opinion, that the act requiring the court to appoint counsel for the prisoner is quite sufficient for that purpose, as we

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have shown. If it were not, however, when the duty enjoined had been performed by the counsel, his right to his pay for it had accrued. The prisoner being a pauper, the liability attached to the county of which he was a citizen. The right of the attorney to compensation was complete, without further legislative enactment. This is not a case of voluntary services. It is a fundamental rule of right, established by the constitution of the United States, "that private property shall not be taken for public use without just compensation." The service was required by competent legal authority, which, having been rendered, the attorney is entitled to his pay for it.

It has been urged that the prosecution being conducted by a prosecuting attorney, who is paid by the county, there is an inconsistency in requiring an attorney to act in defence of the accused, and then to allow him compensation from the county treasury. We have already shown that the prisoner was a pauper, depending on the county in this matter. But furthermore, he is a citizen to whom rights in common with others are guaranteed by the constitution, among which is "the assistance of counsel for his defence." Art. 6, Constitution, U. S. He in this, was entitled to the protection of the law, which has humanely provided for every citizen in like circumstances, "a speedy and public trial by an impartial jury," and the assistance of counsel for his defence, so that he may have a fair opportunity of making his innocence manifest. We consider this view of the design of our legislative enactment, and the right of the attorney under it, as conforming to the enlightened spirit of the present age. So limited and restricted is the sphere of action prescribed for the judge, as to proceedings on trial touching matters of fact, that without the aid of able and experienced counsel, the poor and ignorant man would often find accusation and prosecution tantamount to conviction. The innocent would have their lot with the guilty in suffering the penalty of the law. It is not presumable that this humane provision of the law for the protection of the accused, but innocent, poor

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citizen, was intended by the legislature to be at the expense and in violation of the right of the citizen, whose profession is that of an attorney.

This view of the question is ably presented in the opinion of the judge who dissented in the case of *Whicher v. Cedar Co.* By this judgment of the case, the constitutional and legal rights of the accused citizen are secured, as also are those of the attorney at law. The consistency of the law is preserved, and the liability is justly applied.

The judgment of the district court is reversed and a *venire de novo* awarded, for proceedings to be had not inconsistent with this opinion.

Judgment reversed.

N. Everson, for plaintiff in error.

Patterson and Smyth, for the county.



DILTZ *et al.* v. CHAMBERS.

A writ is not served upon a party in the manner provided by statute by "leaving an attested copy at his place of residence with a member of the family over the age of fifteen years," unless the contents of the writ are stated.

It is error to render judgment by default against a party, unless he was legally served with process.

ERROR TO CEDAR DISTRICT COURT.

Opinion by KINNEY, J. Action of assumpsit brought by Chambers against Stockton and Diltz upon a promissory note calling for \$220. A summons was issued upon which the sheriff made the following return: "Served the within on Peter Diltz on the 31st day of August, A.D. 1849, by leaving an attested copy at his place of residence with a member of the family, over the age of

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fifteen years. Served the within on James D. Stockton, by reading."

Stockton pleaded to the declaration, and a judgment was rendered against Stockton, upon the issue joined, and against Diltz by default. The defendants below sued out a writ of error, and the only error assigned necessary to consider is, that the court erred in rendering judgment against Peter Diltz by default, when there had not been any legal service upon him.

The statute provides, "that all writs of summons issuing from any court of record in the territory, shall be served by reading to the defendant if found, and if not found by leaving a copy thereof attested by the officer serving the same at his dwelling house, or usual place of abode, with some person of the family of fifteen years of age or upwards, and stating the contents to said person." Rev. Stat., p. 475, § 30.

This is a plain statutory requirement. It directs the manner of serving a summons when the defendant shall not be found. It requires the officer to do two things, both of which are necessary to constitute the service, to wit, leaving a copy with some member of the family of the age of fifteen or upwards, and stating the contents of the summons to said person. If either of these is neglected the service is not complete. Stating the contents is as essentially a part of the service as leaving the copy. Neither can be dispensed with. When the statute points out the manner of service, the officer must follow its directions. It is the service which brings the defendant into court, and unless the return shows the writ to have been served according to the statute, the defendant is not obliged to respond to it. The return of the officer should show a strict compliance with the law, as nothing will be presumed in its favor, when it appears that the requirements of the statute have not been observed. In this case, Diltz not having been legally served with process, he was not in default, and hence a judgment by default was improperly rendered against him.

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The judgment against him is therefore reversed at the costs of the defendant in error, and the judgment against Stockton is affirmed.

John P. Cook, for plaintiffs in error.

S. A. Bissell, for defendant.



CAROTHERS *et al.* v. VAN HAGAN *et al.*

In an action of replevin against two or more, it is error to instruct the jury, that "if either of the defendants was not guilty, they must find for both; that one alone could not be found guilty."

ERROR TO MUSCATINE DISTRICT COURT.

Opinion by GREENE, J. Replevin by Carothers against J. P. and J. B. Van Hagan. Verdict before a justice for the defendants, and an appeal taken by plaintiffs to the district court, where the jury found one of the defendants not guilty; and thereupon both were discharged upon the instruction of the judge, that if either of the defendants was not guilty, they must find for both of them; that one alone could not be found guilty unless both were, as charged in the affidavit, even if the property did not in fact belong to the plaintiffs. With much propriety, the plaintiffs contend that this instruction was erroneous. No such principle is recognized by our statute; and as a general rule of law, in all actions for wrongs, any of the wrong doers may be jointly or severally proceeded against, and the misjoinder of an innocent person by mistake will not defeat the action, as it might in a suit on contract. Where several are sued for a tort, one or more may be convicted and held in damages, although a part of them be acquitted. 1 Chit. Pl., 98, 99; 1 Sand., 291 d (mx); 6 T. R., 466; Gould Pl., 209, § 75; 1 Cowen's Trs., 560, § 4; 1 Salk.,

McCasky v. School District No. 1, &c.

On the 16th of March, 1850, the cause was tried by a justice of the peace, and judgment rendered for the plaintiff for \$25, and costs. An appeal was taken by the defendant at the April term of the district court for Cedar county. The cause was tried on the appeal, and a verdict and judgment obtained for the defendant, with costs of suit. It appears by the bill of exceptions that on the trial in the district court the following facts were proven: "That the directors of the school district in October, 1846, contracted with the plaintiff to teach a district school in said district. That he did teach, and after fulfilling the contract, he settled with the directors, and received from them thereon \$35, being the amount of money belonging to said district for that year, leaving a balance due to him of \$25. That the defendants issued their order on the assessor of the district for the balance of \$25, being the same of which a copy is above given. That the inhabitants of the district levied a tax to pay the indebtedness of the district to the plaintiff, for which the order was given. That plaintiff had demanded the money called for by the order of the proper officer of the district. That payment had been refused out of a tax raised as a fund in 1849, on the ground that there was no money in the treasury at the time, notwithstanding more than sufficient had been in the hands of the officers of the district from time to time to pay the plaintiff's order, and paid to the treasurer from the assessment of the tax laid in the district." These facts being in evidence, the counsel for the plaintiff asked the court to charge the jury: "That if the jury believe that the inhabitants of the district levied a tax upon themselves for the purpose of paying the claim on which this suit is brought, and a tax sufficient was collected, and in the hands of the treasurer, or the proper officer, arising from said assessment, and the officers of the district refused to pay it over or liquidate this claim, that the said plaintiff can recover in this action, provided he has made the proper demand, and payment was refused." This instruction was refused.

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Before the cause was finally submitted to the jury, the judge gave general instruction as follows: "If the jury believe from the evidence that McCasky was employed under the act of 1846, and that he was paid by the officers all of the teachers' fund which was in the treasury for that year, and that this order was given to McCasky for the balance, the law requires this balance of McCasky to be paid thus: the deficit is to be assessed upon the parents or guardians of the children in proportion to the length of time they shall have severally attended school during the term when such deficiency arose; and before McCasky can maintain a suit of any kind on this order, the money must have been collected, and paid by the collector into the school district treasury. There is no other law than the act of 1846 which provides for the payment of this teacher's salary, and it matters not if other moneys have been collected and expended in the school district, in pursuance of other acts of the legislature; they do not affect the case of the plaintiff, and he cannot recover except under the act of 1846."

The law and the facts upon which the judgment of the district court is founded, being here presented, we will now proceed to consider them in order to final adjudication of the points raised.

The contract sued on is valid, having been made by the officers of the school district with McCasky, by authority of law, on the 10th of March, 1847. The services for the payment of which the order was given, had been rendered to the district by McCasky, between the month of October, 1846, and the time of the date of the order, March 10, 1847. The fund for that year lacked \$25 of being sufficient to pay plaintiff's demand for teaching. For this the order was drawn on the treasury. On the 2d day of June, 1849, there was a school district meeting legally called, and held for the purpose of voting a tax to pay the debt due to McCasky and another. The tax was voted, raised, and paid into the district treasury. Here, then, the fact is established of record in the case,

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that the school district in 1849 was legally in possession of the fund specially raised by the parents or guardians of the children, or the legal voters of the district, to pay the amount of McCasky's order, which had been previously given; payment of which had been demanded. The whole transaction seems to have been conducted by the school district officers *as such*, in reference to the provision of the statute, which is as follows: "*Section 5. That whenever the amount of money received by any school district, from the fund created by this act, shall be insufficient to pay for the services of the teacher, the deficit shall be assessed upon the parents or guardians of the children, in proportion to the length of time they shall, severally, have attended school during the term when such deficiency shall have arisen.*" Laws of 1846.

The eighth section of this act expressly repeals the third article of the eighteenth section of the act of 1840. The repealed section is different from that in force, only in this, that the former relates to "*the money voted together with the apportionment,*" and the latter, "*to the amount of money received by any school district.*" Otherwise they are substantially the same. So far, then, as the school district officers acted in the matter, we find nothing to have been done by them which was not in substantial conformity with the provisions of the act of 1846; and the final and general instruction of the judge, so far as it applies to the case as affected by the statute, is well enough. But it was error to refuse to give the instruction asked for by the plaintiff's counsel, as above stated. This special instruction should have been given. By the giving of the order, the raising and reception of the tax fund for the special purpose of paying McCasky, the school district officers acted within their proper sphere, so as to establish a liability on the part of the district to appropriate the fund for the purpose intended, which was to pay the amount due to McCasky on the order. It was the duty of the district under the provisions of the law, to provide the fund necessary to pay the teacher for services rendered

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in virtue of the contract made with him, by its proper officers. They were the persons on whom rested the responsibility of judging of the time for which the teacher should be employed, and of the sufficiency of the fund to pay him for his services. We cannot see why the district should be released from the contract thus made by its officers, when the benefit thereof had been received by it, and the whole matter fully recognized by the parties, as *bona fide* and official. A different view of this case, we think, would work great mischief, and thwart the intention of the law, by enabling the school district officers to neglect or decline carrying out its provisions in reference to the procurement of the means to pay teachers, who might render like service, confiding in such officers for the faithful performance of their duty in accordance with their contract.

Judgment reversed.

John P. Cook, for plaintiff in error.

S. A. Bissell, for defendant.



HARLAN v. MORIARTY.

C. was garnisheed in an attachment suit against M., and in his answer it appeared that he had collected funds belonging equally to B. and M.; that both of them claimed the whole amount, but as they had assigned the claim to him, and he believed the assignment vested in him the money, he divided the amount equally in two packages, placing each by itself; that he had paid to B. his half, who at the same time demanded the other half, which he held subject to the order of M. Held that the funds remaining in C.'s hands were subject to the payment of M.'s debts.

ERROR TO JOHNSON DISTRICT COURT.

Opinion by KINNEY, J. The plaintiff in error sued Moriarty by attachment before a justice of the peace, and garnisheed John M. Coleman. Coleman in reply to the

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interrogatory, whether he had any money or property in his hands at the time he was garnisheed belonging to Moriarty, answered, that a certain claim of Ballard & Moriarty against the government of the United States, for publishing land sales in the "Iowa Republican," was forwarded to the commissioner of the general land office, assigned to him by said Ballard & Moriarty, amounting to the sum of \$144. The whole amount was claimed by said Ballard, and also by said Moriarty, respectively, and believing the assignment to vest in him the money, he determined to divide it equally between the parties, after deducting \$12 which Moriarty had directed him to pay one Eliza J. Jones. That he put up \$72 in one package, and \$60 in another, on the evening of the day of service of the said attachment, and offered the said Ballard the \$72, which he refused to receive without the whole, saving the \$12 for Mrs Jones, which he consented witness might retain. That on the evening of the same day after the service of the attachment, Ballard consented to receive the \$72, demanding at the same time the balance in his hands. The balance witness states to be \$60, after deducting the \$12 as aforesaid. That in the letter to him from Moriarty, he directed him to pay in addition to the \$12, \$10 to Gen. Morris, and forward the balance.

Upon this testimony, the justice rendered a judgment in favor of Harlan for the sum of \$16.66 $\frac{2}{3}$ against the said Coleman, as garnishee, as part and parcel of the said sum of \$60, and ordered that the same be credited on the judgment of James Harlan against Peter Moriarty—the balance of \$60 having been applied on the judgment of *James Robinson v. Peter Moriarty*.

From this judgment Coleman appealed to the district court.

A motion was made and sustained in the district court, to dismiss the garnishment, and an order entered discharging the garnishee and requiring the money paid over by said Coleman, in the hands of the clerk, to be returned

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to him. Whereupon Harlan sued out a writ of error, and assigns for error this decision of the court.

We believe this assignment to be well made. By the decision of the court discharging the garnishee and refunding to him the money, the court has evidently treated the assignment of Ballard & Moriarty as made for the use and benefit of said Coleman, and the money collected upon it as legally belonging to him, whereby Coleman, as is evidently disclosed by his testimony, did not so consider it. He was willing to divide the money equally between the parties, to pay Moriarty's orders out of the amount belonging to him, and did pay over to Ballard \$72, being half of the money, on the day of the service of the attachment. The money was divided and put into separate packages, and it is highly probable from his statements, if he had not been garnisheed, the portion belonging to Moriarty would, in pursuance of his orders, have been forwarded to him. We can come to no other conclusion from the testimony of Coleman, than that the assignment was merely to enable him to collect the money, and that in so doing he was acting as the trustee of Ballard & Moriarty, and that the funds, when collected, belonged to both in equal proportions.

But the argument assumed in this court by the counsel for the defendant in error is, that the money in the hands of Coleman, if it does not belong to him, is partnership money belonging to Ballard & Moriarty, and not liable to attachment or garnishment. That the *interest* of Moriarty in the partnership fund could alone be attached. The rule is well settled, that when two or more individuals own an undivided interest in property, and attachment or execution issue against one of them, the *interest* of the debtor in the property, and not the specific article, can alone be seized and sold. The necessity of this rule is, 1st, The legal indivisibility of many kinds of property; and 2d, The hardship and injustice to the co-owner of an absolute severance of the interest without his consent.

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But under our statute, in case of garnisheeing or attaching money in the hands of a third person, susceptible as it is of a perfect division, the reason and necessity of the rule ceases, and although another person may own a portion of the money, we know of no reason why the money itself belonging to the debtor is not as much the subject of garnishment as the *interest* which the debtor may have in it, and especially when that interest is clearly defined and made known by dollars and cents.

In this case Moriarty had not an undefined and indefinite *interest* in the funds in Coleman's hands. He was entitled, from the testimony of the garnishee, to \$60, or nothing. The money had been divided, and Ballard had received his proportion, and the residue Coleman treated as Moriarty's. There is no evidence to show that Ballard was entitled to more than he obtained, neither is it contended that the division did not mete out ample justice to the parties. The contest for this money is not between Ballard and Moriarty, but between Coleman and Moriarty (or Moriarty's creditor). If the money belonged to Moriarty, and was so set apart by Coleman, as is conclusive from his testimony to have been the case, it was liable under the statute while in Coleman's hands to the payment of Moriarty's debts, and Coleman could no more resist the demands of the law upon it than the demand of Moriarty himself. As the case is presented to us, we think the court erred in dismissing the garnishment, and ordering the money to be refunded to Coleman.

Judgment reversed.

C. Bates, for plaintiff in error.

W. Penn. Clark, for defendant.

Lucas v. Snyder.

LUCAS v. SNYDER.

An agreement stipulated that the defendant should build a house in a certain manner, and have it completed on or before the 1st day of March, 1845, for which the plaintiff paid \$400 down, and was to pay \$600 on the said 1st day of March. In an action on the agreement for failing to complete the house within the time and in the manner specified, the declaration averred that the plaintiff was ready and prepared to pay according to the effect of the agreement. Held that the declaration was good without alleging the payment, or an offer to pay the \$600.

ERROR TO MUSCATINE DISTRICT COURT.

Opinion by GREENE, J. This was an action of debt commenced by the plaintiff in error against Thomas Snyder in the district court of Johnson county. Venue changed to Muscatine county. Demurrer to the declaration sustained, and judgment rendered for the defendant. The question now raised is, Did the court err in declaring the declaration to be insufficient? The declaration was framed upon an article of agreement, by which Snyder undertook to furnish materials, and construct for Lucas a good and substantial brick house according to stipulated plans and specifications, upon a piece of land adjoining Iowa city to be pointed out by Lucas; and it was stipulated that the building should be completed on or before the 1st of March, 1845. Snyder bound himself to a true performance of the agreement in the penal sum of \$1000.

As preliminary to the foregoing stipulations, the agreement witnessed that Lucas should pay to Snyder \$400 at the signing of the articles, "and \$600 on or before the 1st day of March, 1845, and for the true payment of which he binds himself, and assigns firmly by these presents."

The declaration avers that Lucas performed the conditions of the agreement on his part by paying the \$400 at the signing of the agreement; by designating the piece

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of land upon which the house was to be built; and by being ready and prepared to pay the \$600 on the 1st day of March, according to the tenor of the agreement. The declaration then sets forth several particulars in which Snyder failed to have the house completed by the 1st day of March as stipulated in the contract, and claims a forfeiture of the penal sum mentioned in the agreement. But the declaration does not aver a performance, or an offer to perform by Lucas so far as the payment of \$600 is concerned. It merely alleges that he was ready and prepared to pay according to the effect of the agreement, and in this particular it is contended that the declaration was defective. This position could not be disturbed if that payment could properly be regarded as a condition precedent to the building of the house, and if the declaration did not show that the plaintiff had given the defendant notice of his readiness to perform. According to our view of the situation and true intention of the parties as disclosed in the agreement, the declaration avers performance of all those conditions on the part of the plaintiff which can be regarded as precedent, and that Snyder's covenant to complete the house on or before the 1st day of March, 1845, does not rest or in any way depend upon the covenant of Lucas to pay the \$600. We regard them as mutual and independent covenants. The nature of the two covenants, the order of time in which the work was to be performed, and the payment made, shows conclusively that the former had to be in process of execution, and finally completed before the day of payment, and consequently, as the acts could not be simultaneously performed, it could not partake of that characteristic of dependent covenants. The doctrine is well settled, that where an act is to be done by one party before the consideration act is to be done by the other, the covenants to do those acts are independent. *Tileston v. Newell*, 13 Mass., 410; *Conch v. Ingersoll*, 2 Pick., 300; *Cunningham v. Morrell*, 10 John., 203; *Goodwin v. Holbrook*, 4 Wend. 377; *Craddock v. Aldridge*, 2 Bibb., 15.

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Apply that rule to the present case. To enable the defendant to perform the work within the stipulated time, it became necessary for him to commence acting long before the day of payment, in order to have the work completed on or before that day, as stipulated. From the nature and terms of the contract, it cannot be claimed that the defendant made the last payment a condition precedent to his liability to perform the work; for that payment was not to be made by the plaintiff until the day by or before which the defendant should completely perform his part of the agreement. His failure to do so rendered him liable on the agreement even before a breach of the plaintiff's covenant to pay could occur. How then could the performance of the work be in any way dependent upon the payment?

There is another very good reason why those covenants should not be regarded as dependent. It appears to be a rule of law that a covenant with a penalty annexed will always be considered as independent. *Freeland v. Mitchell*, 8 Mis., 487.

We therefore conclude that the covenant upon which this suit was commenced is independent, and that the declaration is sufficient.

Judgment reversed.

W. P. Clark and H. D. Dorney, for plaintiff in error.

S. Whicher and J. D. Templin, for defendant.



PATTERSON *et al.* v. STATE OF INDIANA.

Where a power of attorney authorizes a judgment to be confessed for "an amount that may be found due" on the note therein described, and is in

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sufficient form in all other particulars to give the court jurisdiction over the subject matter and the parties, it gives sufficient authority to confess a judgment, which cannot be collaterally impeached for mere irregularity.

The judgment of a court, having jurisdiction of the parties and the subject matter, is conclusive so long as it remains unreversed.

A sheriff's return may be so amended as to set forth truthfully the facts of the service.

ERROR TO MUSCATINE DISTRICT COURT.

Opinion by WILLIAMS, C. J. This is an action commenced in the district court of Johnson county. The venue was changed to the county of Muscatine, in the second judicial district of Iowa.

The plaintiff sued in debt on the record of a judgment, certified from the circuit court of Fountain county, in the state of Indiana, obtained at the September term of said court, on the 10th day of October, 1844. The judgment, as certified, is for the sum of \$689.56 debt, and the further sum of \$74 interest, and also 15 per cent. damages on the amount of the note, on which judgment was rendered, amounting to \$103.43: making in all the sum of \$886.99, with 95 cents costs of suit.

The certified copy of the record of the proceedings had in the circuit court of Fountain county, Indiana, shows that the action was there instituted by the plaintiff, by filing of record the following note of the defendants, viz.:

“\$689.56. Twelve months after date we, or either of us, promise to pay David Brier, as seminary trustee for Fountain county, Indiana, or his successor in office, the sum of six hundred and eighty-nine dollars and fifty-six cents, with seven per cent. interest, from date until March 23, 1843.” This note is signed by the defendants, Patterson and Carleton, and sealed with their seals. At the same time, as appears by the record, David Brier, their attorney in fact, appeared in open court, and proved the execution of a warrant of attorney from said defendants,

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dated the 5th of August, 1844, at Johnson county, Iowa, authorizing and empowering him, or any other attorney at law in the state of Indiana, to appear for them in the circuit court of Fountain county, Indiana, at the next September term, or any other term of said court, and waive the issuing and service of process, and enter his appearance, and waive a declaration in debt in favor of the state of Indiana, for the use and benefit of the seminary fund of the county of Fountain, and confess said action for such sum as shall appear at the time of confessing judgment to be due upon a promissory note given by us in the words and figures following, to wit." The note, as above stated, is here inserted in the power of attorney, which concludes as follows: "And to permit a judgment to be then and there entered against us for such sum, and for the damages and costs chargeable thereon: and we hereby release all errors which may in any manner happen in any part of the proceedings in said action, and to waive all right and benefit of appeal; and for what said attorney shall do in the premises, this shall be a sufficient warrant." Judgment was thereupon confessed, and entered by the court for the aforesaid sum, as debt, interest and damages.

When this cause was removed to Muscatine county, at the May term of the district court, the defendants moved to dismiss the suit for the reason that summons had not been served. Whereupon, on motion of the plaintiff, the return of the sheriff who had served it was amended by leave of the court, which answered and obviated the objection to the service. The defendants then craved *oyer* of the record, on the plaintiff's declaration mentioned. Thereupon a demurrer was filed.

The demurrer was overruled. Judgment for the debt, interest, damages and costs was then entered for the plaintiff.

The defendants set forth three causes of demurrer:

"1st, The power of attorney in said record contained,

and by virtue of which said judgment was rendered, is, and was, void for uncertainty.

“2d, The said judgment is rendered for damages not warranted by the power of attorney.

“3d, The said judgment is rendered for a sum not warranted by the power of attorney, and is illegal and void.”

These are the points made by the defendants on the demurrer in the court below, upon which the ruling of that court was had, and of which they now complain.

We find no error in the judgment of the court below. The defendants, by their power of attorney duly executed, acknowledged the indebtedness, and empowered David Brier, an attorney at law of the state of Indiana, to appear for them in the circuit court of Fountain county, in that state, at the September term thereof, or any other term, and enter their appearance, and waive a declaration in debt in favor of the state of Indiana, for the use and benefit of the seminary fund of the county of Fountain, and confess said action for such sum as should appear at the time of confessing judgment to be due upon a promissory note given by them. The note and the power of attorney, as of record, show the authority which, by the voluntary act of the defendants, was given to the attorney. The judgment was confessed by him in accordance therewith, under the supervision of the court. By the power which authorized the appearance by attorney, and which was duly proved before the confession, the court had jurisdiction of the persons of the defendants; the subject matter was also such that it was clearly within the jurisdiction of the court by which the judgment was rendered.

The power, therefore, to act in the matter is indisputable; as the circuit court of Fountain county, Indiana, is possessed of general jurisdiction, the case was there properly cognizable. This being the state of the case, and the record being duly authenticated, can the defendants be permitted in this action to go behind the judgment of the circuit court of Fountain county, to impeach it for irregularity, and set that up as a defence here? We think

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they cannot. If the court had acted without jurisdiction of the persons of the defendants, without their consent or waiver; if it had not jurisdiction of the subject matter, or if there had been fraud in the obtaining of the judgment, then, in either of these cases, the validity of the judgment might be impeached by proper pleading, and the district court might have inquired into and adjudicated these matters. The defence there presented consisted of irregularities for which the defendants had, and if true, might have obtained, ample redress in the supreme court of the state where the judgment was rendered. This legal mode of redress has not been resorted to by them, and therefore they must be left to the legitimate consequences of their own laches. The judgment of a court having jurisdiction of the parties, and of the subject matter of the action, is conclusive between the parties to the action, so long as it remains unreversed. *Warburton v. Atkin*, 1 McLean, 460; *La Grange v. Ward*, 11 Ohio, 257; *Swiggart v. Harber*, 4 Scam., 364; *Evarts v. Gove*, 10 Vt., 161; *Granger v. Clark*, 9 Shep., 128; *Mitchell v. State Bank*, 1 Scam., 526; *United States Bank v. Voorhees*, 1 McLean, 221. The principle upon which this court decides the case at bar is clearly set forth in the case of *Cook v. Darling*, 18 Pick., 393. It is there decided, that "in an action of debt on a judgment of the court of common pleas, the judgment cannot be impeached, or avoided as erroneous by plea, but the remedy is by writ of error." The reason there assigned is, that "the judgment is of a court of common law jurisdiction, to which a writ of error lies to reverse it if erroneous." It would be otherwise if the matter complained of were such as to be incorrigible by writ of error. It will not be contended here that the matters complained of could not have been corrected, if true, by resort to a writ of error, as they would be found of record, and appertained to the jurisdiction of the court by which the judgment was rendered.

We think it unnecessary to discuss at length the other question presented by the assignment of the plaintiffs in

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error. It is enough to say that where the return of a sheriff as to service is imperfectly indorsed on the writ, the court may before trial, on motion, grant leave to amend it, so as to set forth therein truthfully the facts of the service.

Judgment affirmed.

Wm. G. Woodward, for plaintiffs in error.

G. Folsom, for defendant.



ROBINSON v. MORIARTY.

An attachment will hold all chattels, moneys or evidences of debt, or any interest which the debtor may have in them.

Where C. had collected funds for B. and M., and paid to B. his portion, and where no creditors of B. and M. as partners claimed the funds remaining in the hands of C., it was held that they were liable for the individual debts of M.

ERROR TO JOHNSON DISTRICT COURT.

Opinion by KINNEY, J. Robinson sued Moriarty by attachment before a justice of the peace, and garnisheed John M. Coleman. The facts in relation to the money in the hands of the garnishee are the same as in the case of *Harlan v. Coleman*,* and Coleman's answer not materially different from his testimony in that case. The justice rendered judgment against Coleman as garnishee, and credited the same upon the judgment in favor of *Robinson v. Moriarty*. Coleman appealed, and on his motion in the district court the garnishment was dismissed, and a like judgment entered as in the case before mentioned. Robinson brings the case to this court, relying for a reversal upon the error of the court in sustaining the motion. It is also contended in this case by the

* Ante, 486.

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counsel for the defendant in error, that the funds in Coleman's hands were partnership funds, and consequently no portion of them liable to be taken by attachment, or subject to be garnisheed by the creditors of Moriarty.

An examination of the statute on this subject, and a proper application of it, we think will settle this question beyond controversy.

By the second section of the act regulating attachments before justices of the peace, the justice, upon the proper affidavit being made, is required to issue a writ of attachment against the property and effects of the defendant. And in the third part of the fourth section, it is provided, that when goods and chattels, money or evidences of debt are to be attached, the constable shall seize the same, and keep them in his custody, if accessible; and if not accessible, he shall declare to the person in possession that he attaches the same in his possession, and summon such person as garnishee.

Under this statute the proceedings in this case were conducted, and, as far as appears from the papers, the provisions of the statute were strictly complied with. It is only necessary to remark in this case, in addition to what was said in the case of *Harlan v. Coleman*, that under this statute, Coleman, as garnishee, was obliged to disclose any and all interest Moriarty had in the funds in his hands, and if that interest, when so disclosed, was susceptible of being reduced to an amount certain, the specific sum would be held by the attachment. If, however, by the testimony, it proved to be a *mere interest*, then the interest alone was held by the attachment, and could have been sold upon execution.

The writ, by virtue of the statute, would reach all chattels, moneys or evidences of debt, and also any interest in either which the debtor might have in the hands of a third person.

But in this case, as in the case of *Harlan v. Coleman*, the amount in the hands of the garnishee was certain and fixed, and we cannot see, even if Ballard and Moriarty

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were partners, (the former having received his proportion,) how that fact should affect the remaining fund, so as to protect it from attachment.

The fact of Ballard and Moriarty being partners, and the money in Coleman's hands partnership funds, would not protect the amount belonging to Moriarty from garnishment. True, from the great weight of authority, the partnership creditors would in equity be first entitled to the payment of their claims out of the partnership assets, in preference to separate creditors. But in this case there is no evidence that there were any such creditors. If, however, there were such, they could enjoin the funds in the hands of Coleman, and a court of equity would, if they were partnership funds, have appropriated them for the benefit of the creditors. But as no such steps were taken, and as there was no interference on the part of the partnership creditors to prevent the payment of the money to the separate creditors of Moriarty, we think the court erred in dismissing the proceeding and ordering the money to be refunded to Coleman. Judgment is therefore reversed, and a trial *de novo* awarded.

Judgment reversed.

C. Bates, for plaintiff in error.

Wm. Penn. Clark, for defendant.



LUCAS v. SNYDER.

When an instruction extends merely to the legal effect and meaning of an instrument, it cannot be objected to as an instruction upon the facts in the case.

ERROR TO MUSCATINE DISTRICT COURT.

Opinion by GREENE, J. This was an action of assumpsit commenced before a justice of the peace in Johnson

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county by Thomas Snyder against Robert Lucas. Judgment for the plaintiff. Defendant took an appeal and obtained judgment in district court. New trial granted; venue changed from Johnson to Muscatine district court, and there the plaintiff obtained a verdict and judgment for \$70.

The suit was instituted to recover the value of certain plastering done by the plaintiff in a dwelling house for the defendant. This house had been built by Snyder under a contract to finish the same in complete order except the plastering of the upper story. The account appears to have been for plastering the upper story, which was not included in the above contract.

On the trial Lucas gave in evidence a receipt from Snyder for “\$500 for work done on a house in accordance with the annexed plan.” The court instructed the jury that the “receipt does not, from its terms, refer to such plastering as was excluded from the written contract. And for this instruction it is contended that the judgment should be reversed. In support of this position, it is assumed that the charge involves a question of fact which comes alone within the province of the jury. But we do not consider it an instruction upon facts. It is one of construction only, involving the legal signification and extent of the receipt. It was therefore a subject upon which the court could with propriety charge the jury.

As the instruction extended merely to the legal effect and meaning of the instrument before the court, and as the other proceedings in this case were substantially correct, the judgment below cannot be disturbed.

Judgment affirmed.

W. Penn. Clark, for plaintiffs in error.

S. Whicher and *J. D. Templin*, for defendant.

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HOLMES v. THE STATE.

A proceeding against the father for the support of his illegitimate child is not in the nature of a criminal action, and therefore, under the constitution, the defendant is exempt from imprisonment; and that portion of the bastardy act which authorized such imprisonment is repealed by the constitution.

ERROR TO MUSCATINE DISTRICT COURT.

Opinion by KINNEY, J. Complaint made before a justice of the peace by Mary Margaret Sheely against the plaintiff in error under the act concerning bastardy. Holmes was held to bail in the sum of \$200 for his appearance at the next term of the district court, where, upon trial before a jury, he was found guilty. The court thereupon adjudged that he stand charged with the maintenance of the child in the sum of 50 cents each week, for the period of two years, from the 8th of October, 1846, (the birth of the child,) and after that time that the said Holmes stand charged with the maintenance of the child in the sum of \$52 a year until the child was seven years of age; and among other things it was further ordered and decreed that the said Holmes give security to perform the order of the court, and in case of neglect or refusal to give the security and pay the costs of the prosecution, that he be committed to the county jail, there to remain until he should comply with the order of the court therein made. To reverse this judgment of the court the defendant below sued out a writ of error, and assigns for error: That the court erred in ordering that the said John Holmes be committed to the jail of the county in default of his paying the costs and giving security for the performance of the order of the court.

The statute under which this proceeding was instituted provides, that in case the reputed father shall fail or neglect to give the security required by the court, and pay the

costs of prosecution, he shall be committed to the jail of the proper county, there to remain until he shall comply with the order of the court, or until such court shall, on sufficient cause shown, direct him to be discharged. Rev. Stat., p. 200, § 5.

By the constitution adopted since the act passed to provide for the support of illegitimate children, it is provided, that "no person shall be imprisoned for any debt in any civil action on mense, or final process, unless in case of fraud, and no person shall be imprisoned for a militia fine in time of peace." Art. 2, § 9. As this article in the constitution abolishes imprisonment for debt in all civil actions, (except in cases of fraud,) it becomes important to ascertain and determine whether a prosecution under the bastardy act is a civil or criminal proceeding. In many respects the forms used in the suit are very much assimilated to those adopted in criminal cases. Complaint against the putative father is made before a justice of the peace, a warrant is the process used, running in the name of the state, by which the accused is arrested and brought before the magistrate, and in case it appears that he is the father of the child, and if he does not pay the complainant such sum as she may agree to receive, &c., he is required to enter into recognizance for his appearance at the next term of the district court. Thus the way and manner pointed out by the statute for the complainant to bring her suit for the support of the child, resembles in many respects proceedings in criminal cases. Still the charge of bastardy against the defendant in itself is in no sense of a criminal nature. The defendant has not violated any criminal or penal statute, nor was the connection which produced the illegitimate offspring forbidden by law. He could not have been indicted, nor in any manner convicted or punished as a public offender. The statute has provided for the punishment for rape, fornication, and adultery, but neither of these need be resorted to for the purpose of begetting a bastard child, and not even seduction, as the right of action is complete when the

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intercourse is by mutual consent of the parties, and a child the result of such immorality. A natural as well as a civil liability attaches to the father to support his own offspring, however much the mother may have been the cause of inducing the act which brings into the world a bastard child.

The complaint and proceedings are of a summary nature to secure to the woman (who is in such cases favored by the law) a speedy remedy for the support of her infant child. She is permitted to use the name of the state to have compulsory process, and thus she can obtain a judgment without that delay attending civil suits in the usual form. In this way she is saved much trouble and inconvenience. Immediate means can be obtained for the support of the child, and the door of escape to some extent closed upon the defendant, whereby he is prevented from avoiding those legal and moral obligations which men under such circumstances are very reluctant to observe.

For the purpose of affording a prompt remedy this statute was passed. But while the statute gives the right to a speedy action, and the woman is permitted to bring to her assistance the forms of criminal law, still the suit thus allowed to be instituted is a civil suit, to inure to the benefit of herself and child.

The mother may dismiss the prosecution, settle the matter, and release the defendant if she chooses, or if judgment is obtained, receipt it in full, and the state cannot interfere or prevent it. The object and purposes of the complaint are to obtain from the putative father an amount sufficient to maintain the child, and not to punish him criminally for the carnal intercourse.

The judgment of the court ordering the accused into confinement until he should comply with its conditions is not the infliction of punishment for a criminal offence, or for anything which he has done, but rather as a punishment for not complying with the requirements of the law, and the judgment of the court.

With the exception of the decisions of two states with

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peculiar statutes in relation to bastardy, we cannot find a case where proceedings in bastardy are decided to be strictly criminal proceedings. In Pennsylvania the prosecution is by indictment. *Commonwealth v. Pintard*, 1 Browne, 59.

In Massachusetts and Vermont the prosecution is held to partake of the nature of both a civil and criminal suit. *Hill v. Wells*, 6 Pick., 104; *Rubie v. McNiece*, 7 *ib.*, 419. But in many of the states with statutes similar to our own, where the defendant is arrested, pleads not guilty, is bound over to court, and can be committed to jail in failing to comply with the orders of the court, a suit in bastardy has been held a civil suit. *Harman v. Taylor*, 2 Conn., 357; *Schaler v. Commonwealth*, 6 Litt., 89; *Martson v. Jennings*, 1 N. H., 156; *Monroe v. Dyer*, 2 Greenl., 165; *Seintland v. The Commonwealth*, 6 J. T. Marshall, 585; *Walker v. The State*, 6 Black., 1.

In the case in 11 N. H., with a statute much like ours, the court say: "It is evident, we think, from these considerations, that the object of the statute is not to impose a punishment for an offence, but to redress a civil injury. For the purpose of affording this redress, the legislature (as they may in all cases of civil injury) have deemed it expedient to authorize the employment of process usually applicable to criminal proceedings alone. But the process is merely the form by which the redress is sought. The purpose to be obtained is an indemnity. As soon as this indemnity is furnished, the object of the law is satisfied, without affixing any stigma upon the character of the respondent as in criminal convictions, and in other states it is regarded as a civil remedy. The court further say that complaints under the act are substantial civil suits, although some of their forms are adopted from the criminal code." The said doctrine is contained in the authorities above cited.

We think it clear from the authorities, as well as from the nature and object of the action, that the suit brought in this case was a civil suit, and that the defendant under

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the constitution was exempt from imprisonment. That portion of the judgment of the district court ordering the defendant John Holmes to be imprisoned, is reversed at the costs of the defendant in error, and the remaining portion of the judgment is affirmed.

S. Whicher, for plaintiff in error.

W. G. Woodward, for defendant.

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An attachment is vacated by a judgment of nonsuit against the plaintiff. Where a nonsuit is set aside, and a new trial granted, the attachment lien vacated by the nonsuit is not revived.

ERROR TO LINN DISTRICT COURT.

Opinion by GREENE, J. This was an action of trespass commenced before a justice of the peace, by William M. Harris against Horace N. Brown, William R. Lewis, and William Wallace, for taking a quantity of corn which had been levied upon by said Harris as constable, under a writ of attachment sued out by A. Hollenbeck against Wilbert L. Lewis. Judgment rendered against Brown and Lewis, and an appeal taken by them to the district court.

On the trial, Harris claimed the right to recover in the capacity of constable, and offered in evidence the writ of attachment issued in the case of *Hollenbeck v. Lewis*. The return upon the writ showed that he had attached the undivided half of twenty acres of corn. The entries in the docket of the justice before whom the attachment suit was tried were admitted in evidence. Among other things, the docket shows, that on the return day of the writ, October 3, 1846, the plaintiff appeared, but the defendants not

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having been served with process, it was ordered that the cause be set for trial November 2, 1846, at 10 o'clock A.M., and that the plaintiff give notice as required by law. On that day the parties failed to appear, and there being no proof of the required notice, the plaintiff was nonsuited. November 7, 1846, plaintiff filed an affidavit, and a motion to set aside the judgment of nonsuit, which motion was granted, and a new trial ordered to be heard on the 23d of said month; and Lewis was served with notice of the new trial. On the day appointed for trial, the defendant failed to appear, and thereupon judgment was rendered against him for the sum of \$36.25.

After the said docket of the attachment suit was introduced, the defendant requested the court to instruct the jury, that the judgment of nonsuit in said attachment case destroyed the attachment lien although the nonsuit was subsequently set aside. But the instruction was refused, and this refusal constitutes the principal ground of error contended for in this case. The only question, then, to be determined is, Will a nonsuit of proceedings commenced by attachment vacate the lien?

The statute authorizes justices to render judgment of nonsuit when plaintiffs fail to appear in the manner provided, and to set aside such judgments, where good cause is shown, within six days after the rendition. Rev. Stat., 323, §§ 1-4.

In deciding the present question, it is not necessary to inquire into the regularity of the proceedings by which the nonsuit in the attachment case was set aside. We are only called upon to decide whether the instruction asked and refused should not have been given to the jury.

Ordinarily a nonsuit is regarded as the final determination of the action, and of all process connected with its commencement and progress. As a consequence, then, any attachment levy would be vacated by such a judgment. It is true, under our statute, a judgment of nonsuit may be set aside and a new trial granted. But in what way can this revive the attachment lien, which was destroyed by

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the nonsuit? The new trial ordered extends only to the cause of action and revives the issue between the parties, but it imparts no vitality to a levy which had been vacated by the nonsuit. It does not even revive the original writ; a new process is required, which is to be served, executed and returned in like manner as a summons. Rev. Stat., 324, § 4.

The attachment act provides, that when an attachment shall be dissolved, all proceedings touching the property and effects attached shall be vacated, and the suit proceed as if it had been commenced by summons only. Rev. Stat., 342, § 13. As the nonsuit did in effect dissolve the attachment, it necessarily follows that the property was released from the writ; and after the suit was opened up, it could only be conducted as if commenced by summons.

It has been decided in other states, that judgment for the defendant, *ipso facto*, dissolves an attachment, and that the officer cannot detain the property though the plaintiff sues out a writ of review. *Clap v. Bell*, 4 Mass., 99; *Johnson v. Edson*, 2 Aik., 299; *Snydam v. Huggeford*, 23 Pick., 465. Applying the principle of those decisions to the case at bar, we think it must follow that a judgment of nonsuit against an attachment plaintiff will, *ipso facto*, destroy his lien, although the nonsuit may have been set aside, and the court below should have instructed the jury to that effect.

Judgment reversed.

S. Whicher and P. Smith, for plaintiffs in error.

I. M. Preston and C. Bates, for defendant.

Greene & Brothers v. Ely.

GREENE & BROTHERS v. ELY.*

The statute in relation to mechanics' liens should be strictly pursued.

A petition describing the property and stating the nature of the indebtedness is not sufficient; it should be accompanied with a bill of particulars of the materials or labor furnished.

The acceptance of a note is not a relinquishment of a mechanics' lien, unless it appears to have been intended as a waiver of the lien.

ERROR TO LINN DISTRICT COURT.

Opinion by KINNEY, J. Greene & Brothers filed their petition for a mechanics' lien under the statute, setting forth that Alexander L. Ely in his lifetime was seized in fee simple of a certain tract or lot of land situate in the town of Cedar Rapids in said county, and known as lots 4 and 5, in fractional block 3; and that said Ely in his lifetime did contract, on the 16th day of February, 1848, with petitioners for a large amount of materials, work and labor, which was done, delivered and performed by petitioners for said Ely, for the purpose of erecting a flouring mill on the lots of land aforesaid, and that in pursuance of said contract, said materials, work and labor were furnished for the said Ely, for the erection of said mill. The petition further states, that said Ely in his lifetime accounted to and with the petitioners for the work, labor and materials furnished as aforesaid, for the erection of said flouring mill, and upon such accounting there was found to be due petitioners the sum of \$1327.94, and that the said Alexander L. Ely, on the 16th day of February, 1848, executed and delivered to petitioners his certain promissory note for the above sum, as a balance due them for the labor and materials as aforesaid, which said note was due one day from the date thereof, and a copy of the same filed and made part of the petition.

The petition contains the usual prayer for the adminis-

* Greene, J., took no part in deciding this case and that of *Mix v. Ely*.

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trator to be a party, &c., and a prayer for judgment and a mechanics' lien on the lots of land and flouring mill erected thereon, and for all the benefits of an act entitled, "An act relative to mechanics' liens and other purposes," approved 13th February, 1843.

The copy of the note, as set out in the petition, reads as follows :

"\$1327.94.

"One day after date, I promise to pay Greene & Brothers or order, the sum of one thousand three hundred and twenty-seven dollars and ninety-four cents, with interest at the rate of ten per cent., for value received ; it being the balance due said Greene & Brothers on settlement for material, and for paying for work on my flouring mill at Cedar Rapids.

ALEXANDER L. ELY.

"February 16, 1848."

A precipe was filed with the petition, requiring the clerk to issue a summons and indorse thereon, "*Action brought for Mechanics' Lien.*"

A special demurrer was filed by the defendant to the petition, assigning for cause, among other things, that no person as heir or devisee of said Alexander L. Ely, and no person as his widow, and who are interested in the real estate of said deceased, is made party to said suit. The court sustained the demurrer, whereupon the petitioners asked and obtained leave to amend their petition.

An amended petition was then filed, making the widow and heirs of the deceased parties, and setting forth more in detail the alleged facts connected with the furnishing of labor and materials for the erection of said mill.

The defendants demurred to the amended petition, and assigned for special cause of demurrer :

1. That no contract was set forth within the meaning of the statute.

2. It is not alleged that said work and labor and materials were furnished by virtue of any contract within the true intent and meaning of the statute.

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3. No bill of particulars of work, labor and material is given.

4. That the note, of which a copy is filed, and upon which the petition is based, is not sufficient to sustain the same.

5. Said petition does not show what, and what amount of work, labor and materials, respectively or collectively, was contracted for.

6. That a promissory note was taken in payment.

This demurrer was sustained by the court, and the said petition in law deemed insufficient to enable the petitioners to recover thereon.

This decision of the court we think correct. The third specification of demurrer is well assigned. The statute in relation to mechanics' liens being in derogation of the common law, should be strictly complied with. Unless those entitled to the lien created by the statute come within its provisions, they cannot obtain the aid for which it was enacted. The lien is purely statutory, and the manner of enforcing it clearly defined, and while such a statute should receive a construction so as to make it effective, and accomplish the object the legislature had in view, still an essential departure from its plain and obvious requirements will be fatal to those who attempt to enforce it. Rev. Stat., 381, § 2, among other things provides, that if an action to enforce a lien shall be commenced in the district court, it shall be by bill or petition, describing with common certainty the tract of land, town lot, building, mill or machinery upon which said lien is intended to be made to operate, and also the nature of the contract or indebtedness, *with a bill of particulars of his account*. It is not sufficient to file a petition describing the property and nature of the indebtedness, but a bill of particulars, with specific items of materials or labor furnished, or both as the case may be, must accompany the petition.

This being required, a compliance is as necessary before the petitioner is entitled to his lien, as the observance of any other provision pointed out by the statute.

But it was said in the argument that a copy of the note

filed with the petition was a sufficient bill of particulars. For the mere purpose of collecting a debt, a note given in settlement of items of indebtedness obviates the necessity of any bill of particulars. The items have become merged in the note, and the payor, by executing the note, acknowledges the correctness of all the charges. But notwithstanding this, a note is not a bill of particulars, neither can it take the place of it, when the statute demands the bill to be filed. Judgment could be obtained upon the note without the bill of particulars, but when the petitioner asks to have certain property held by virtue of a special lien provided by statute, it then becomes important for the defendant to know the items upon which he predicates his lien, and for the court, before they can allow the lien, to ascertain whether the indebtedness for which the lien is sought is made up of such items, and accrued upon such contract, as will justify the court under the statute in granting the lien.

But we deem it unnecessary to show further the utility of a bill of particulars in all cases of petitions under the act. The statute in express terms requires it, and it is the duty of courts to declare and enforce the law as it exists.

But it was further said in the argument, that the note itself sufficiently designates the character of the indebtedness to enable the plaintiffs to obtain a lien. We do not think so. Upon the other hand, the note to some extent is evidence against the petitioners, and proves that they are not entitled to a lien for a portion of the amount for which it was given. Section 1 of the Rev. Stat., p. 380, provides, that in all cases hereafter, when any contract shall be made between the owner of any tract of land or town lot, or the lessee of any tract of land or town lot, with the owner's knowledge or consent on the one part, and any person on the other part, for the erecting or repairing any house or other building, mill or machinery, or their appurtenances, or for *furnishing* labor or materials for the purposes aforesaid, and every person who may have furnished materials which may have been used in the construc-

tion of such house, building or mill by agreement, the persons who shall, in pursuance of such contract, have furnished labor or materials for such purposes, shall have a lien, &c.

The statute gives the right to the lien to the following persons: 1. Those who shall enter into a contract with the owner of any tract of land or town lot, to erect or repair any house, building or machinery; 2. Those who contract for a like purpose with the lessee of any tract of land or town lot, with the owner's knowledge or consent; 3. Those who furnish labor or materials for the purpose of erecting or repairing such buildings, mill or machinery, &c.; and 4. Those who may have furnished materials which may have been used in the construction of such buildings, &c. These are the only persons provided for, and an individual is only entitled to the benefits of the statute by exhibiting an indebtedness which falls within some of the above provisions. The note relied upon in this case is given for a balance due said Greene & Brothers on settlement for materials, and for *paying* for work on the flouring mill. The statute does not extend to those who pay for work or materials, but to such as furnish them. In the former case the credit is given to the man, in the latter the creditor looks to the building.

As the *nature* of the indebtedness provided for by statute is clearly defined, it follows that a lien can only be acquired upon such indebtedness as is therein specified, and as there is no provision for a lien in favor of those who pay for labor, that portion of the note proves upon its face that the petitioners were not entitled to the benefit of the statute to the extent of their demand.

It was argued at some length on the trial of this cause, that the petitioners were barred from asserting a lien in consequence of having received a promissory note on settlement. We do not think so. In case of *Goble v. Gale*, 7 Blackf., 218, it was held, that a mechanics' lien for work done was not waived by taking his employer's note for the money due for the work, and in giving a receipt in full for such money, the note not being paid, and that in ab-

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sence of proof to show that the taking of the note was intended as a waiver of the lien, the lien would still hold good. Although we are aware that a different doctrine is to be found in the decisions upon this subject, yet we believe this to be correct, and fully sustained by sound reason. Why should not a mechanic be as much entitled to his lien after taking a note, as a vendor after receiving an obligation for the purchase money? If the note does not extinguish the lien in the latter case, by parity of reasoning it ought not in the former.

This we deemed it necessary to say on this last proposition in support of the right to recover, but as the petitioners did not comply with the statute by filing a bill of particulars, and as the note on which they predicated their right to a lien was evidence against them to defeat such lien to the amount claimed, the demurrer was correctly sustained and the judgment of the court is therefore affirmed.

Judgment affirmed.

Hempstead & Burt, and *I. M. Preston*, for plaintiffs in error.

W. G. Woodward and *Wm. Smyth*, for defendant.

MIX v. ELY.

A petition for a mechanics' lien set forth that payment was to be made as the work progressed, and at the completion, if any balance was due the plaintiff, it should be paid as might then be agreed; held that this was a sufficient statement of the time of payment by virtue of the contract.

Where a bill of particulars is as definite as the nature of the transaction will permit, it is sufficient.

A right to a mechanics' lien is not affected by accepting a note.

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Where a note became due May 1, 1848, and the summons in a proceeding for a mechanics' lien was served March 27, 1849, it was held that the action was commenced within the time required by statute, *i.e.*, within one year from the time payment should have been made.

In a proceeding for a mechanics' lien, the administrator of defendant's estate may properly be made a party, and if plaintiff takes a judgment without making the heirs a party, he does it at his peril.

ERROR TO LINN DISTRICT COURT.

Opinion by KINNEY, J. The plaintiff in error filed his petition for the benefit of a mechanics' lien. The petition was demurred to and the demurrer sustained. An amended petition was filed, setting forth that on the 1st day of January, 1845, Alexander L. Ely, since deceased, was the occupant and owner of lots 4 and 5 in block 3 in the town of Cedar Rapids in Linn county. That at that time said Ely entered upon the building of a flouring mill on said lots, and that petitioner being a practical millwright, a contract was made between him and said Ely, whereby it was agreed, among other things, that said petitioner should superintend the building and construction of said mill, and should furnish hands to work on the same, for such reasonable wages as might thereafter be agreed upon. That said Ely was to pay petitioner from time to time as the work progressed, and to settle with petitioner for any balance which might be due him when the work was completed, and to pay the same as should then be agreed upon. That petitioner, in pursuance of the agreement, entered upon the performance of said contract on his part, and gave his own services in superintending the job, and furnished hands to do the work in building said mill.

The petitioner further states that he has no written copy or memorandum of said contract, and that none was made, and that he has not the account of the work and labor performed, and furnished in building said mill, and cannot set forth the same item for item, but that a memorandum of the substance of said contract will

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be found in the books of said Alexander L. Ely, and in the hands of the defendant, and charges that on the said books will be found the full particulars of all his accounts. Petitioner further states that by said books a settlement up to the close of the year 1846 was made in May, 1847, and the situation of the accounts up to that time entered thereon; and that on the completion of said mill, to wit, on the 23d day of December, 1847, petitioner and said Ely had a final settlement of all the work furnished by said petitioner, and that for such work in erecting said mill there was found a balance due petitioner of \$373.5, all of which petitioner charges to be correct, and calls upon defendant to produce said books for more full and particular information. Petitioner further states, that upon such final settlement said Ely gave to petitioner his promissory note for the amount so found due him, which said note was given for the work aforesaid in erecting said mill, a copy of which is set out in the petition, and was as follows:

“For value received I promise to pay R. C. Mix or bearer three hundred and seventy-three dollars and five cents, on the first day of May next with interest.

“December 23, 1847.

ALEXANDER L. ELY.”

Petitioner charges that this amount is now due and unpaid, and prays that the same may be adjudged a lien on the aforesaid premises, and for special execution to sell the same, that the said John F. Ely, administrator of the estate of said Alexander L. Ely, may be made party defendant, &c., and for general relief.

Accompanying the petition was a bill of particulars which petitioner alleges is as perfect as he can make it without reference to the books of said Ely. This bill of particulars specifies the work done by petitioner, and furnished by him, the date, and amount due after deducting out the credits.

The petition was demurred to by the defendant for the following special causes:

1. That no contract was set forth within the intent of the statute.

2. That the time of payment by virtue of the contract was not stated.

3. That no sufficient bill of particulars was set forth.

4. That the plaintiff took and accepted the defendant's promissory note for the balance claimed according to the petition, and therein gave time for payment.

5. The action was not commenced within one year after payment was to be made by virtue of the contract.

6. The proper parties to the bill are not made.

This demurrer was sustained by the court, and the petition deemed insufficient in law to enable the plaintiff to maintain his lien.

We think the court erred in sustaining the demurrer.

The contract is sufficiently stated in the petition, and the time of payment as well specified as could have been done according to the terms of the agreement. Payment was to have been made as the work progressed, and at the completion of the mill, if any balance was due the plaintiff, the same was to be paid as should then be agreed on. This disposes of the first and second causes of demurrer.

In relation to the third, we have already decided, in the case of *Greene & Brothers v. Ely*,* tried at the present term of the court, that a bill of particulars was necessary. But in this case, there is a bill of particulars, which, although not as full as it ought to be in ordinary causes of this nature, yet it appears from the statements of the petitioner to be as specific as was possible for him to make. It seems that from the confidence he reposed in the integrity of Mr Ely, he had entrusted the keeping of his accounts entirely to him. His books contained all the items, from them the settlements had been made, and they were in the possession of the administrator, inaccessible to the plaintiff. The defendant is in possession of all the information upon the subject of the indebtedness, and he is called upon to produce the books in court which exhibit all the

* Ante, 508.

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facts. If it were possible to dispense with the filing of a bill of particulars, this case would present a seeming propriety in doing so. But as the statute is inflexible upon this subject, the rule cannot be relaxed. However, the plaintiff has saved his case in this respect, by filing a bill of particulars, and has furnished a forcible reason for not making it more definite and pointed.

The fourth cause of demurrer is answered in the case above referred to. The settlement of a demand by note, which in its nature entitled the creditor to the lien provided by statute, will neither bar nor affect the lien, unless there is evidence to show that the right to the lien was waived by accepting the note.

Upon examination it is found that the fifth cause of demurrer is not sustained by the facts. The note was given on the 2d of December, 1847, and was due on the 1st of May, 1848. The summons was served on the 27th March, 1849. The second section of the act, p. 318, provides, that "when any person shall wish to avail himself of the benefits of such lien, he shall commence his action in any court having jurisdiction of the same, within one year from the time payment should have been made by virtue of such contract, by which such lien shall be claimed."

The payment of the note on the contract which created the lien should have been made on the 1st day of May, 1848. It was only necessary, then, to commence the suit within one year from that time. By the terms of the contract, as set forth in the petition, (and which are admitted to be correct by the demurrer,) the amount due the plaintiff on the completion of the work was to be paid at such time as should then be agreed upon. The parties agreed upon the 1st of May for such payment. According to the state of the pleadings, this is the same as if the parties had agreed in the original contract upon that time as the time for the final payment; and hence, in computing the time for the commencement of the action, it should be reckoned from the day of the maturity of the note, and not from the day when the work was completed. But we

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are not prepared to say that such would be the rule, if time for payment in the original contract was not stipulated by the parties.

But it is said that "the proper parties are not made to the bill." Whether the demurrant means by this specification party plaintiffs or party defendants, the demurrer does not advise us. It is entirely too vague and indefinite. The administrator is certainly for one a proper party, and if there are others, heirs for instance, who should have been made parties, the petitioner takes his lien and special execution at his peril. A proceeding to enforce a mechanics' lien, affecting as it does the realty, cannot bind or preclude the heirs from asserting their rights, unless they are party to such proceeding.

But in this case, there is no allegation or suggestion either in the petition or demurrer that there are heirs, and the court upon special demurrer are not at liberty to presume anything which does not appear of record.

The judgment of the court, therefore, upon the demurrer is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

Davis & Bissell, for plaintiff in error.

W. G. Woodward and *Wm. Smyth*, for defendant.



DURHAM v. DANIELS.

Where the court instructed the jury in relation to the legal effect of deeds, it cannot be considered a charge upon the facts.

All acts of incorporation are made public, and as such may be given in evidence; such an act creates the presumption that the corporation does exist *de facto*.

ERROR TO LINN DISTRICT COURT.

Opinion by GREENE, J. An action of right, commenced by S. W. Durham against A. Daniels, for a tract of land adjoining the town of Marion. Pleadings in the usual form. Cause submitted to a jury. Credit for the plaintiff with \$12 damages. There having been no proof of damages, plaintiff entered a remittiter for \$11.99 of the damages assessed. Defendant filed a motion for a new trial, which was granted.

At the next term of court, the cause was again submitted to a jury, and a verdict returned for the defendant. Motion for a new trial overruled, and judgment rendered upon the verdict.

Upon the trial it appeared that both parties claimed title to the land in question from Henry Oliver, who purchased and held the patent from the United States. The plaintiff, in support of his right, submitted a deed from Oliver to Robinson, dated February 11, 1845, one from Robinson to Scott, dated in May, 1845, and one from Scott to plaintiff, dated March 8, 1847. The defendant claimed by virtue of deeds from Oliver to a corporation known as the "Marion Lyceum." Said deeds were dated February 24, 1843, and January 5, 1844.

By request of defendant, the court instructed the jury, "That Oliver, at the date of the deed to Robinson, had no title, and consequently the plaintiff could derive no title under said deed from Robinson, and that if the jury believe from the evidence that the title to the land in controversy is in the Marion Lyceum, the plaintiff cannot recover against the defendant, unless by virtue of some title from, through, or under said Lyceum."

The objection urged to the proceedings below are mainly founded upon those instructions.

1. It is urged that the court usurped the province of the jury, and charged them upon the facts instead of the law in the case. But we think the instructions are legiti-

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mate. They merely explain to the jury the legal effect of those deeds. They only amount to a plain self-evident proposition in law, that after a man has conveyed away all his title to a lot of land, a subsequent deed from him can impart no right.

2. It is contended that the defendant, in attempting to show an outstanding title in the Marion Lyceum, should first prove that it did exist *de facto* with capacity to hold real estate. As nothing appears in the record to the contrary, the legal presumption must follow, that the court below did not act without adequate evidence. Besides, the Marion Lyceum is a corporation, which the court could notice *ex officio*. It was incorporated by an act of the legislature, (Laws of 1841, p. 16,) and all acts of incorporation are declared public, and as such may be given in evidence. Rev. Stat., 572, § 2.

Other errors were assigned and urged in this court, but as they are not sustained by the record, we do not consider it necessary to notice them.

Judgment affirmed.

I. M. Preston, for plaintiff in error.

W. Smyth and N. W. Isbell, for defendant.



ZERFING v. MOURER.

In an action of trespass for debauching plaintiff's daughter, if he did not actually connive at the guilty intercourse, evidence of loss occasioned by it will justify a recovery. Proof of careless indifference could only go in mitigation of damages.

ERROR TO CEDAR DISTRICT COURT.

Opinion by GREENE, J. This was an action of trespass on the case, brought by George Mourer for debauching his

Zerfing v. Mourer.

daughter, whereby she became pregnant and was delivered of a child. Plea, Not guilty. Verdict and judgment for the plaintiff.

On the trial, defendant requested the court to instruct the jury, that if the plaintiff, by a careless indifference of his daughter's chastity, whether by design or otherwise, has afforded facilities of criminal intercourse between his daughter and the defendant, he cannot recover. The court refused to give this instruction as asked, and instead of it, charged the jury, that if from the testimony they believed the plaintiff had, by a careless indifference for his daughter's chastity, either by design or otherwise, afforded facilities for criminal intercourse between her and the plaintiff, it would be matter in mitigation of damages only, and **not a bar to plaintiff's recovery.**

The plaintiff's loss of his daughter's service caused by the defendant's carnal intercourse with her, constitutes the gravamen of this action. If, therefore, the plaintiff did not actually connive at the guilty intercourse, evidence of loss occasioned by it would be sufficient to justify a recovery. If instances of careless indifference for a daughter's chastity should be admissible to defeat a suit of this character, the action could seldom be maintained. Such instances might be adduced in every proceeding of the kind. The fact that a parent should ever suffer his daughter to place herself in any situation where she might be seduced, could under such a rule be referred to the jury as evidence of "careless indifference." And thus the very proof of debauchery would defeat the cause of action it was intended to establish, by showing that through the carelessness or indifference of a father, the daughter, at an unlucky moment, was permitted to go beyond his immediate observation, when she was entrammelled by the seducer, or **voluntarily injured by her paramour.**

Should that doctrine obtain, this action could never be maintained by the poor father, whose destitute situation requires the absence of his child from a parent's vigilance, to aid in procuring means of subsistence.

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We are therefore of opinion, that the instruction asked was correctly refused, and that the court properly charged the jury, that proof of such careless indifference should only go in mitigation of damages.

Judgment affirmed.

S. Whicher and *S. A. Bissell*, for plaintiff in error.

J. P. Cook, for defendant.

FULWIDER v. PETERKIN.

The statute authorizes a proceeding against an executor or administrator for a conveyance in pursuance of a contract with the deceased.

In a proceeding against an estate for a specific performance, it is not necessary to make the heirs a party to the conveyance.

IN EQUITY. APPEAL FROM CEDAR DISTRICT COURT.

Opinion by KINNEY, J. The bill filed in this case shows that the appellants purchased of David Peterkin, in his lifetime, (now deceased,) on the 28th of April, 1843, the south half of section 10 in township 79, north of range 2 west, in the county of Cedar, containing three hundred and twenty acres, and that the said Freeman & Fulwider executed of that date their joint notes to said Peterkin, payable in January, 1844, 1845 and 1846, amounting in all to the sum of \$600, and took a title bond for a deed for said land, to be made upon the payment of said notes. David Peterkin died without having made a deed, and before the complainants were entitled to one. Alexander Peterkin was made administrator, who, on the 31st day of September, 1847, obtained a judgment on these notes for \$649.12. The bill charges, that it is not in the power of the administrator to make a good and sufficient deed to complainants, as there was

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no provision in the contract by which the heirs were bound to make a deed in the event of death. That the consideration of the notes on which judgment was obtained was the contract for the land, which complainants charge was not complied with by said David in his lifetime, and cannot now be enforced. That the said defendant having obtained the judgment, was about to sue out execution and collect the same. The bill prays for a cancellation of the contract, and a perpetual injunction against the defendant from the collection of said judgment.

The sworn answer of the defendant admits the making of the contract for the consideration stated in the bill, the death of David Peterkin, the administration of defendant, and the recovery of the judgment. Answer alleges a readiness on the part of the administrator to carry out and perfect the contract so far as he has power, and prays the court to empower him to convey the land described in the contract, when payment shall have been made; that as complainants have not made payment, they are not entitled to a conveyance. The names of the heirs of said David, with their residence, are disclosed in the answer, and an allegation that the complainants have been since the making of the contract, and still were, in possession of the land; and the answer concludes with a prayer for the dissolution of the injunction, and that the court may order and decree what shall be right and equitable in the premises.

Exceptions to the answer were filed, which were overruled by the court, and the cause was submitted and decided upon bill and answer, whereupon the court decreed a dissolution of the injunction, and that the respondent be at liberty to proceed in the collection of said judgment. And it was further decreed, that said judgment being first satisfied, that the respondent make and execute to the complainants a deed of conveyance, conveying to them in fee simple, the land described in the contract.

We think the court decreed correctly.

The statute provides, that when any person who is bound

by a contract in writing to convey any real estate, shall die before making the conveyance, the other party may have a bill in equity to enforce a specific performance of the contract by the heirs, devisees or executors or administrators of such deceased person, and that the court shall hear and determine such case according to the course of proceedings in chancery, and shall make such decree thereon as equity and justice shall require.

This statute contemplates and clearly gives the right to proceed against either executor or administrator, for a conveyance in pursuance of the contract of the deceased. The administrator standing in the place of the deceased person, there is an obvious propriety in making him *the party* in a proceeding to enforce the performance of a contract made by deceased in his lifetime, the obligations of which rest upon the administrator as his representative. But the statute has settled this matter in such explicit language, that there cannot be room for reasonable doubt. The twenty-ninth section, p. 703. provides, that "if it shall appear that the plaintiff is entitled to a conveyance, the court may authorize or require the executor or administrator of the deceased party to convey the estate in like manner as the deceased person might and ought to have done if living, and if his heirs or devisees, or any of them, are within the territory [state] and competent to act, the court may require them, or either of them, instead of the executor or administrator, to convey the estate in the manner before mentioned, or may require them, or either of them, to join in such conveyance in the manner before mentioned." And the thirtieth section provides, that every conveyance made in pursuance of such decree shall be effectual to pass the estate contracted for, as fully as if when made by the contracting party himself. It is not necessary, in a proceeding under this statute for a specific performance, that the heirs should join in the conveyance in order to pass a good title. The court can decree the administrator or executor to convey without the heirs, and the conveyance made in pursuance of such

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decree, will be as effectual to pass an estate in fee, as if made by the party in his lifetime. True, the court may require the heirs or devisees, or either of them, if living in the state, to join in such conveyance, providing they are competent to do so; but this is entirely within the discretion of the court. In this case, as all of the heirs except the administrator, according to the answer, reside in England and Scotland, the court could not compel them to unite in the conveyance.

The complainants having the right by virtue of the statute to enforce a specific performance against the administrator, and thereby obtain a decree against him, and by such decree, or a conveyance made in pursuance of it, obtain a perfect title; the ground upon which they pray for a cancellation of the contract, and a perpetual injunction against the collection of the judgment, is entirely removed. But by the decree they are not obliged to resort to their remedy for specific performance, as the court have decreed a conveyance upon payment of the judgment aforesaid. In this we think complete justice has been done to the parties, and the decree is therefore affirmed.

Decree affirmed.

S. Whicher and *S. A. Bissell*, for plaintiffs in error.

W. G. Woodward, for defendant.



BROWN v. TOMLINSON.

Where the breaches in any count in a declaration in covenant are well assigned, a general demurrer should not be sustained.

Under the statute, a special covenant at the end of a deed in which the grantor warrants against all claims from or under him, does not limit or explain the more general warranties which are covenanted by the words, "grant, bargain and sell."

A restraint by implication upon such general warranties is not authorized by statute; it must be positive and expressed.

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ERROR TO CEDAR DISTRICT COURT.

Opinion by GREENE, J. An action of covenant on a deed executed by John J. Tomlinson to Henry D. Brown, October 12, 1842. The deed acknowledged a consideration of \$320, and conveys the N.E. fractional quarter of the N.E. fr. qr. of section 6, in township 80 N. of range 2 W. of the 5th meridian, containing forty and twelve-hundredth acres; and also the N. half of the N.W. qr. of the same fr. qr. section, containing twenty acres. In the conveyance the words "grant, bargain and sell" are used, and the further covenant "to warrant and for ever defend the title to the same premises against the claims of all and every person whatsoever, from or under him." After setting forth the contents of the deed, the declaration avers that at the time and before its delivery, one Charles M. Jennings was seized in fee of the twenty acre tract of land as described and set forth in the deed; that on the 24th day of September, A.D. 1841, the said twenty acres of land were duly attached by William H. Tuthill, for debts due him from said Jennings; and on the 18th day of May, 1842, a judgment was rendered upon said attachment in favor of said Tuthill; that execution issued in September following, and in October of the same year, the land was duly sold to said Tuthill, to whom a sheriff's deed was executed June 7, 1844, by virtue of which he took possession, and was seized in fee of said twenty acres of land; that as said Tuthill had possession of said land, the plaintiff Brown, on the 19th of May, 1847, commenced an action of right against him, and in due course of proceeding thereon, the said Tuthill obtained a judgment by which the plaintiff was expelled and for ever barred from the possession and employment of said premises. The declaration then avers, that the land from which the plaintiff was expelled by judgment is one and the same twenty acres which he had purchased of said Tomlinson, and then sets forth the failure of Tomlinson to warrant

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and defend the same, and alleges that he had no estate of inheritance in fee simple therein, and that he had no right, power or authority to convey the same. The declaration contains three counts, in each of which two or three breaches are assigned.

The defendant cravedoyer of the deed, and demurred generally to the declaration. The demurrer was sustained, and in this it is contended that the court below erred.

There is much in the declaration which must be regarded as defectively pleaded; but it cannot well be assumed that all the covenants and breaches are ill assigned.

Without inquiring particularly as to the others, we think that the breaches of covenant of seizin and of authority to sell and convey are well assigned, and the same may well be assumed of the general warranty in the second count. It is a well settled rule that where the breaches in any count are well assigned in a declaration of covenant, a general demurrer should not be sustained.

It follows, then, that if the averments in the declaration are warranted by the legal effects and force of the covenants contained in the deed, that the court below improperly decided that the action could not be maintained. And this brings us to the principal question involved in the case. Does the special covenant at the end of the deed, in which the grantor warrants against all claims from or under him, limit and explain the more general and extended warranties which are covenanted by the words "grant, bargain or sell?" The decision in the court below shows that this question was necessarily decided in the affirmative. Independent of the statute, and under the assumption that the words of conveyance contained only *implied* covenants, incompatible with that stipulated by the special warranty, the correctness of that decision could not be controverted. But our statute regulating conveyances enters largely into the covenants of this deed. The sixth section of that act, Rev. Stat., 204, declares that the words "grant, bargain and sell," in all conveyances, shall, unless restrained by express terms, "be construed to be

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the following express covenants: 1. That the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate in fee simple in the real estate thereby granted. 2. That such real estate was, at the time of the execution of such conveyance, free from incumbrance done or suffered by the grantor or any person claiming under him. 3. For further assurance of such real estate to be made by the grantor and his heirs to the grantee, his heirs and assigns, and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance." The construction to be given to this language is obvious; there is no room for ambiguity or doubt. Those words of conveyance are to be considered as something more than an implied warranty; they are to be regarded as express covenants, and are to have the same bearing before a court, the same legal construction as they would if specially set forth in the conveyance, unless restrained by express terms. A restraint by implication will not suffice, it must be positive, it must be expressed; or, according to the statute, the covenants may be sued upon in the same manner as if they were expressly inserted in the conveyance. Now the question presents itself, Are not those covenants of seizin and of freedom from incumbrance, as expressed by the words of conveyance, perfectly compatible with the special warranty against the claims of all persons from or under the grantor? Though the latter and more limited covenant may be mainly comprised within the former, it is still perfectly reconcilable with them, and as they are in no way restrained or excluded by express words in the deed, we can come to no other conclusion than that the covenants which were expressed by virtue of the statute which enters into the conveyance should co-exist and operate with that which is especially set forth in the deed. Had the parties intended to limit or restrain the warranty to the latter covenant, such intention could have been expressed by one or two words in the instrument. Those words cannot be supplied by intendment; nor upon a doubtful point should the construc-

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tion be strongest against the covenantee. In the present deed, then, we think that the grantor makes three express covenants : first, of seizure in fee ; second, against incumbrances ; and third, against his own acts. We think that these three are clearly accordant ; that the plaintiff is entitled to recover for a breach of either ; and that at least one of them is pleaded, and the breach sufficiently assigned in the declaration.

But it is urged that the third covenant is unnecessary, unless applied as a limit to the first and second. If unnecessary, it does not follow that it should be adjudged inconsistent with the antecedent covenants, or that they are restrained by it, when no word or term is expressed which can denote such intended limitation.

In *Hesse v. Stevenson*, 3 Bos. & Pul., 565, where a covenant was regarded as unnecessary, it was not therefore considered inconsistent. So that where one covenant stipulated that the defendant had good right and absolute authority to convey, and another had not by any means forfeited any right or authority he ever had over the property in question, it was held that the former covenant was not restrained by the latter. And in *Gainsforth v. Griffith*, 1 Saund., 59, it was held that the general covenant of a good and indefeasible lease was not restrained by one for quiet enjoyment restricted to acts of the covenantor. In this case the rule was laid down that an express general covenant in fact cannot be restrained by any subsequent covenant, if not construed as a part of the first general covenant. *Smith v. Compton*, 3 Bar. & Ald., 189. But it was understood that a particular covenant in fact may restrain a general covenant by intendment of law. Apply this rule to the present case. There is no connection between the third and the two preceding covenants. They are made in very different parts of the deed without any connecting word ; and by statute the covenants contained in the words of conveyance are made express covenants in fact, as much so as if they had been expressly mentioned, and therefore, according to

Gainsforth v. Griffith, cannot be qualified by the concluding covenant.

In *Hawell v. Richards*, 11 East., 633, it was held that the generality of the covenants for quiet enjoyment was not restrained by the qualified covenants for good title and right to convey for anything done by the releasor to the contrary.

In *Roebuck v. Duprey*, 2 Ala., 535, it was held that although a deed contains express covenants, yet others not inconsistent with them may be implied and rendered operative. The same doctrine was held in *Gates v. Caldwell*, 7 Mass., 68. If an implied covenant may be rendered operative with an express covenant in the same deed, is there not even more reason for giving force to two separate express covenants where the one does not conflict with the other?

In Pennsylvania, with a statute similar to ours, and in a case where the land conveyed had been incumbered previous to the sale, it was held that the covenants contained in the words "grant, bargain and sell" were not inconsistent with, nor restrained by an express covenant of special warranty; and that the covenants implied by those words could only be restrained by express terms of limitation. *Funk v. Voneida*, 11 Serg. & R., 109.

And in *Alexander v. Schneiber*, 10 Mis., 460, under an act identical in terms, it was held that the covenants implied by the words "grant, bargain and sell" in a deed of conveyance are separate and independent of each other; and that a general warranty is only limited by a special one where the two are inconsistent.

In the absence of our statute, the authority and arguments presented by counsel for the defendant in error would have peculiar force, for at common law the rule appears to be well settled that general implied covenants are qualified and restrained by any connecting and express covenant of a more limited character, especially where the two are not reconcilable. 11 East., 633; 15 *ib.*, 530, 8 Mass., 202; 7 John., 258; 11 *ib.*, 122. This doctrine no

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doubt originated from the principle that general terms are limited by connecting specifications; and as an application it might well be urged that parties having entered into express agreements, it should not be supposed that they intend anything more by their general language than is stipulated in express covenants, and this would appear especially reasonable if the one could not operate consistently with the other. But in this case the covenants are not inconsistent, although in part superfluous; and as our prevailing law, the statute has given peculiar effect to the words "grant, bargain and sell," it cannot be abated by mere implication, nor by the authority of decisions made where no such statute was in force. These words of conveyance create something more than implied covenants, as we have seen; they are declared to be express, the same as if specially mentioned, and in their very nature they become special as well as general covenants, (*Gratz v. Ewalt*, 2 Binney, 95;) and they are to have full effect, "unless restrained by express terms contained in such conveyance." Such is the explicit direction of the statute, and the parties must be presumed to have known the law, and to have made their covenants accordingly. And as the covenantor made them without any express limitation, to enforce one by implication would do violence to the intention of the parties, and prevent the obvious letter of the statute. We therefore conclude that the court erred in sustaining the demurrer.

Judgment reversed.

Wm. Smyth and *L. B. Patterson*, for plaintiff in error.

J. P. Cook and *W. G. Woodward*, for defendant.

RICHMAN v. THE STATE.

The question was put to a witness before a grand jury, "Do you know of any person, other than yourself, being engaged in gaming at any time within two years in the county of Muscatine?" held, that witness could not refuse to answer on the ground that it would have a tendency to implicate himself.

A witness cannot be justified in refusing to answer questions which cannot, from their nature, tend to criminate him; and of such a question-he cannot be the judge.

Where, from the nature of the question, the answer would inevitably criminate the witness, he is sole judge, and may answer or refuse to answer the question.

ERROR TO MUSCATINE DISTRICT COURT.

Opinion by KINNEY, J. In this case, the plaintiff was called before the grand jury as a witness, and the following question propounded to him by the foreman: "Do you know of any person, other than yourself, being engaged in gaming at any time within two years in the county of Muscatine?" Which question the said Richman refused to answer, alleging that to answer it would have a tendency to implicate himself. Whereupon the said Richman was ordered by the court to answer said question, and refusing to do so, was fined \$10 for contempt, and a judgment rendered against him for that amount, with leave to except to the opinion of the court in requiring him to answer said question, and to the judgment rendered against him; which facts are certified to this court by agreement for a decision.

The witness should have answered this question. An affirmative or negative reply could not in any manner have criminated him. The inquiry does not embrace all the gaming within the knowledge of the witness, but only such gaming as was known to the witness in which he was not a party. If the witness had not been excepted in the interrogatory, there would have been more propriety in his refusing to answer, as he might have been a party himself to all the games within his knowledge in the county

of Muscatine within the time specified, and in such case an affirmative answer would have a tendency to implicate him. But clearly, as the question was put, he could not claim the benefit of the rule. The rule is, that a witness cannot be compelled to answer any question, the answering of which may expose or tend to expose him to a criminal charge, or to any kind of punishment. 2 Phillips on Ev., 417. But it has been, and still is, to some extent, a controverted question, whether the witness or the court is to be the judge as to whether the answer will criminate the witness or not. In the authority above referred to, it is said, that "it is the province of the court to decide whether a proposed question has a tendency to criminate the witness, and it is the duty of the court, while it protects the witness in the due exercise of his privilege, to take care that he does not, under the pretence of defending himself, screen others from justice, or withhold evidence which he might safely give. The court should be satisfied that the witness is acting an honest part, and that he may incur danger by answering; when satisfied of this, it will allow the privilege. To force him to reveal particulars might lead to a prosecution against which he has a right to protect himself." In conformity with this doctrine was the general rule, as laid down in the celebrated case of *United States v. Burr*, 1 Rob., 215, in which the court held that it was "the province of the court to judge whether any direct answer to the question proposed will furnish evidence against the witness." But the chief justice qualifies the *general rule* by saying, that if the answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict the witness of any crime, he is not bound to answer it. "In such case, the witness must himself judge what his answer will be, and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer."

We understand from this and other decisions on this subject, that in relation to the privilege of witnesses it is

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necessary to avoid these two extremes : 1. That of *permitting* the witness to protect himself by his privilege by refusing to answer questions which cannot, from the nature of the answers sought, criminate him ; 2. That of *compelling* him to answer, when, from the nature of the questions, the answer would inevitably criminate him. In the first, the court must be judge and compel the answer. In the second, the witness is sole judge, and may answer or refuse as he sees proper.

When it is evident to the mind of the court that the answer cannot accuse the witness, the court should require him to respond to the interrogatory. If this were not the case, it would be in the power of the witness, when called upon to give testimony in a criminal case, to refuse to do so. If he is to be sole judge whether the answer would implicate him by thus answering, it would be impossible to elicit any testimony. Perjury could not only be committed with impunity, by stating that the answer would criminate him, but the guilty would be screened from merited punishment. We cannot sanction a rule fraught with such dangerous consequences. The direct tendency of such a rule would be to suppress truth, and prevent the administration of justice. Therefore, we think the better and safer rule to be that of compelling the witness to answer, when it is apparent to the court that such answer would not interfere with his legal privilege. In this case it was evident, from the scope of the question, that an answer could not possibly infringe upon this right, and yet the witness makes himself the judge, and refuses the answer.

The position of the witness furnishes a familiar illustration of the evil consequences which would result from the enforcement of such a rule as he has contended for in the argument, and a most potent reason for the distinction which we have made.

Judgment affirmed.

J. Scott Richman, pro se.

D. C. Cloud, for the state.

Abbee v. Higgins.

ABBEE v. HIGGINS.

A motion supported by affidavit is no part of the record unless made so by bill of exceptions.

Where it appears by the returns of the sheriff that a writ was served in the manner provided by statute, it is good, even if it should appear that the defendant had been three months absent from his dwelling.

ERROR TO LINN DISTRICT COURT.

Opinion by GREENE, J. Higgins sued Abbee in an action of assumpsit on a promissory note. It appears by the sheriff's returns that the defendant could not be found in the county; but that he left an attested copy of the writ "at the dwelling house or last place of residence of said defendant, in said county, with Mary Abbee, the wife of said defendant, she being a person of the said defendant's family, upwards of fifteen years of age, and stated the contents thereof to said person." The defendant appeared specially by attorney, and filed a motion to dismiss the writ for the want of service, averring in the motion that Abbee is not a resident of the county, nor of the house described in the return; that he had been absent three months at least on an expedition to California, where he expected to remain two or three years. This motion was supported by the affidavit of defendant's attorney, and overruled by the court. The cause then came on for trial; the defendant failed to appear, and judgment was rendered against him by default for the balance due upon the note.

It is now objected that the court below had no jurisdiction over the person of the defendant to justify the judgment. The record in the case shows no foundation for this objection. The motion made by defendant's counsel is no part of the record. It is not made so by bill of exceptions or otherwise. The mere act of filing a motion in a case is not sufficient to make it a part of the record. It was held by *Cook v. Steuben Co. Bank*, 1 G. Greene,

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447, that a motion is no part of the record unless made so by bill of exceptions.

In this case, after securing the action of the court upon his motion, the attorney withdrew without taking any exception to the decision, thus creating the presumption that he acquiesced in the decision, and having no further defence to the action, he suffered judgment to go by default.

But even if the motion was properly before us, we should not be able to disturb the judgment. The return of the sheriff shows that the writ was properly served by leaving an attested copy at the dwelling house or last place of residence, and with the wife of defendant, stating the contents to her. The facts stated in this return are not controverted by the motion. If the defendant had been absent three months, if he had started to California with the intention of remaining there two or three years, but still had left his family, his home, and his property in the county, it would not show an abandonment of his residence, nor affect the service of a writ, when it appears to have been made in the manner provided by statute.

Judgment affirmed.

N. W. Isbell, for plaintiff in error.

Wm. Smyth, for defendant.



PRESTON *et al.* v. DANIELS *et al.*

If it appears by a bill in equity that complainants had a plain and adequate remedy at law, it is good ground for demurrer.

Where funds collected by a sheriff on *fi. fa.* were demanded by D. and N., and also by P. and H., and each party showed an equal right to them, it was held D. and N. had not a plain and adequate remedy at law, and that they might proceed in equity.

Where, from any defect in the common law, want of foresight in the parties,

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or other mistake or accident, there would be a failure of justice, it is the duty of a court of equity to interfere and supply the defect or furnish the remedy.

The supreme court is not authorized to grant a lien upon a judgment for an attorney's fees, as it would be an exercise of original jurisdiction.

IN EQUITY. APPEAL FROM LINN DISTRICT COURT.

Opinion by GREENE, J. A. Daniels and C. Nye filed their bill, in which the following facts are stated: March 18, 1846, E. T. Lewis obtained judgment against Levi Lewis, in the district court of Linn county, for the sum of \$143.39 cents, and on the 23d of the same month, assigned \$52 of the judgment to Preston & Hastings. July 21, 1846, E. T. Lewis assigned the balance of the judgment to the complainants, who filed the assignment in the clerk's office. In April of that year, Levi Lewis took the judgment by writ of error to the supreme court, where, in July, 1847, it was affirmed. Shortly after, a writ of *fi. fa.* was issued from the supreme court to the sheriff of Linn county, who collected the money, paid \$56.82 over to Preston & Hastings, and retained the balance in his hands. This balance of \$100.19 was demanded of the sheriff by complainants under the assignment which had been made to them, but the sheriff refused to pay the same over to them on the pretence that Preston & Hastings had a lien of \$90 on the amount, for their fees as attorney for E. T. Lewis.

Complainants charge that the \$52 assigned by Lewis to Preston & Hastings was the only lien they had acquired for their professional services; that the \$90 were neither claimed nor acquired until after judgment in the supreme court; that Preston & Hastings had notice of the assignment to them; and the claim of \$90 was intended to defeat and defraud them; that E. T. Lewis was insolvent, and that they had no remedy at law. The bill concludes with a prayer, that the pretended lien be adjudged inoperative, and that a writ of injunction may issue to restrain the

sheriff from paying the money over to any other person than themselves. E. T. Lewis, I. M. Preston, S. C. Hastings and A. Harlan, the sheriff, were made defendants.

Preston & Hastings demurred to the bill on the ground: 1. That E. T. Lewis should be a plaintiff, if a party at all to the bill; 2. That the complainants had an adequate remedy at law. Thereupon, Lewis filed a disclaimer of all interest. The demurrer was overruled, and the bill dismissed as to Lewis.

Preston & Hastings' answer admits the judgment, assignments, &c.; that the \$52 assigned to them was for professional services; that the \$90 claim was partly for other services than those rendered in the suit against Levi Lewis; but claims that the \$90 was a lien allowed by the supreme court; that their claim for fees was in accordance to an agreement between them and E. T. Lewis, at the time he placed his claim against Levi Lewis in their hands for collection; that at the time Preston received notice of the assignment to complainants, he gave them notice of his and Hastings' claim for additional fees, upon the judgment; and insists that said assignment was not in good faith, and that if any consideration passed, it was for a pre-existing debt, which was not cancelled by the assignment. Exceptions were taken to the separate answer of I. M. Preston, and thereupon he filed an amended answer, in which he states that the services for which \$90 are claimed were rendered in suits prior to April 1, 1847. Upon the bill and answers the court decreed that the supposed lien of Preston & Hastings be inoperative as against the assignment to the complainants, and that the sheriff should pay the money over to them.

1. It is objected, that the demurrer to the bill should have been sustained, on the ground that complainants had a plain and adequate remedy at law. If complainants had an adequate remedy at law, it is clear that the demurrer should have been sustained, and the bill dismissed. But we think that the facts stated in the bill show no such legal remedy. The money was in the hands of the

sheriff, and demanded from him by two different parties, both of whom showed *prima facie* an equal right to it; and therefore the sheriff was justified in not paying the money over to either of them. The sheriff was not in default. He was not required by the process upon which he had collected the money, to pay it over to complainants; nor does it appear that the time had expired within which he was required by law to make return of the *fi. fa.* to the supreme court. As the sheriff had not neglected his duty in the premises, the complainants had no action at law against him; and as Preston & Hastings had not obtained possession of the funds claimed by complainants, they had no remedy against them.

Counsel have failed to point out the plain and adequate remedy at law which complainants had for this money. We are told that they might have had their remedy at law against Preston & Hastings, if the sheriff had paid the money over to them. If this proposition was correct, it could not add force to the demurrer in the present case. It by no means follows that they *had* a plain and adequate remedy at law, because they might *have had* such a remedy if certain things had taken place. As the contingency did not happen, it follows that complainants did not acquire the remedy which it is claimed they had.

It was not necessary for them to lay by and lose the use of their money, upon the supposition that some event might happen which might enable them to proceed by suits at law. A court of chancery will not require a party to defer his rights to the supposition that a contingency may happen which will give him a remedy at law. The rule is laid down by Chancellor Walworth, and is doubtless approved by all equity tribunals, that where, from any defect of the common law, want of foresight in the parties, or other mistake or accident, there would be a failure of justice, it is the duty of a court of equity to interfere and supply the defect or furnish the remedy. *Quick v. Stuyvesant*, 2 Paige, 84. The bill in the case at bar comes with obvious propriety under this rule.

Again, it was held in *Winthrop v. Lane*, 3 Desau., 323, that the general powers of a court of equity are very great; that it is assistant to the courts of law in counteracting fraudulent judgments, or when in conscience and equity the plaintiff ought not to avail himself of a judgment at law. And in *Watson v. Palmer*, 5 Ark., 501, it was held that equity will relieve from a judgment at law, when the party was prevented by unavoidable necessity from appearing or making his defence. The lien allowed to Preston & Hastings by the supreme court, in the present case, was upon their *ex parte* application, without notice to the complainants, and without their knowledge. In conscience and equity, according to *Winthrop v. Lane*, they ought not to avail themselves of the benefit of that lien to the prejudice of complainant's previously acquired right. And according to *Watson v. Palmer*, equity ought to afford them relief, because, from a want of notice, they were not permitted to appear and defend against the application. Again, whenever the remedy at law is defective, doubtful or difficult, a court of equity has jurisdiction. *Seymour v. Delaney*, 3 Cow., 445; *Amer. In. Co. v. Fisk*, 1 Paige, 90; *League v. Russell*, 2 Stewart, 420.

Upon the first point we conclude, then, that the bill presents a case in which relief may be given in a court of equity, and that the demurrer was correctly overruled.

2. As an objection to the decree, it is urged that the right of Preston & Hastings to a specific lien was *res adjudicata*; that the allowance was made to attorneys as officers of the court, and is obligatory.

If the matter had been within the jurisdiction of the supreme court, and if all the parties affected by the lien had been properly notified of the proceeding, it might with propriety be regarded as *res adjudicata*. But as the powers of this court are merely corrective and appellate, as they comprise no original jurisdiction, our authority to grant an original application for a lien may well be questioned. Such an act cannot but be regarded as an assumption of original power, unauthorized by the constitu-

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tion and laws of the state. By such an application a new issue was raised, new parties were substituted, and a subject matter not before adjudicated was brought before this court. The motion was hastily presented, no one appeared to object, and without sufficient consideration the lien was granted. We are now satisfied that this proceeding was extrajudicial, that the lien was *coram non judice* and *void*. The court below, then, did not err in declaring the lien to be inoperative.

The fact that the attorneys were officers of this court cannot change the case; it cannot enlarge our jurisdiction.

An attorney is doubtless entitled to a lien for his services upon a judgment obtained by him for his client; but that lien must be secured before a court of original jurisdiction.

If the lien is sought for services rendered in the supreme court, it can only be secured by having the judgment returned to the district court.

As this question of jurisdiction justifies the decision of the court below, it is not necessary to inquire into the merits of the lien.

Decree affirmed.

S. Whicher and *I. M. Preston*, for appellants.

N. W. Isbell and *Wm. Smyth*, for appellees.

CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT OF THE STATE OF IOWA,
DUBUQUE, JULY TERM, A.D. 1850,
In the Fourth Year of the State.

Present.

HON. JOSEPH WILLIAMS, *Chief Justice.*
HON. JOHN F. KINNEY, } *Judges.*
HON. GEO. GREENE, }

BURLERSON *v.* TEEPLE *et al.*

A fence built upon public land, even by mistake, passes with the freehold to the purchaser from the government; and if such fence is detached from the realty by a wrong doer, the purchaser's right to it is not divested.
A duplicate receipt or certificate from the receiver or register of a land office is made by statute *prima facie* evidence of title in actions of trespass, right, &c.

ERROR TO JACKSON DISTRICT COURT.

Opinion by KINNEY, J. Burlerson sued the defendants in error before a justice of the peace, in an action of trespass, for entering upon his premises, and carrying off one

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hundred and seventy-five rods of rail fence, and for taking away five thousand rails, to the damage of the plaintiff of \$100. The defendants recovered a verdict, and the plaintiff appealed. Upon the trial in the district court, the plaintiff gave in evidence the original duplicate receipt from the register of the land office, bearing date the 7th day of January, 1850, as evidence of title and possession of the *locus in quo*. The plaintiff also proved that the fence was standing on the premises at the time of the entry, and that it was a stake and rider fence, and standing until the day before the rails were removed. The testimony also showed that the rails were in piles when the defendant took them, and did not show that the defendant meddled with the rails while in the fence.

The testimony tended to show that the fence was **on** the premises of the plaintiff, from ten to twenty rods distant from the south line of Burlerson's land. That the fence was put there by defendants some seven years before the commencement of the suit, and at that time they supposed it was on the line between the *locus in quo* and their own land; also that the *locus in quo*, at the time the fence was built, was government land, and there was no evidence that Burlerson ever claimed the premises previous to his entry. The defendants, among other things, asked the court to instruct the jury, that if the jury believe that the rails were originally the property of the defendants, the plaintiff cannot recover unless there is evidence that they touched the rails in the fence, which was given by the court, and excepted to by the plaintiff. The court also charged that, if the jury believed, from the evidence, that the fence, of which these rails were made, was made by the defendants, supposing they were on the line of their own land; that if it turned out that they were on the land of the plaintiff, or which the plaintiff purchased, the defendants had a right to go and take them as their own, without being liable to an action of trespass to Burlerson, notwithstanding the general principle of law, that whoever

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owns the land owns the houses, fences, and everything upon it. To which charge the plaintiff excepted.

The plaintiff asked the court to instruct the jury, that if the jury find that the fence stood some fifteen rods from the north line of plaintiff's land, that he will be entitled to the fair value of the rails, even though the defendants may have supposed, at the time they built the fence, it was on the south line, which instruction the court refused. Whereupon the plaintiff excepted, &c. This constitutes the testimony and material part of the instructions given and refused, as set out in the bill of exceptions, and upon which the jury found a verdict in favor of the defendants. Giving the instructions asked by the defendants, and refusing those of the plaintiff, are assigned for error. The question presented by the evidence and the instructions, when narrowed down, is simply this: Did Burlerson, by his entry of the land, acquire title to the fence upon it, although that fence was placed there by the defendants through mistake, supposing at the time it was made to be upon the line of their own land, and put there for the purpose of a line fence? The court instructed the jury that the defendants had a right to remove the rails. This was error. Nor is it material whether the rails, at the time they were removed, were in a fence or in piles. The testimony shows that at the time the land was entered by Burlerson, the fence was standing, and as such it was attached to, and constituted part of, the freehold, and became the property of the plaintiff as much as a house, or any other permanent fixture upon the land. "It is a general principle, that all permanent buildings follow the tenure of the soil on which they are erected. The fence which encloses a field is within the doctrine. It is necessary for the use and occupation of the ground, and cannot be removed without injury to the freehold. On alienation it passes with the soil." *Seymour v. Watson*, 5 Blackf., 555; 4 Kent Com., 342; 3 Bacon Abt., 63.

Burlerson having become the owner of all the improvements by virtue of his purchase, the act of a wrong doer,

in detaching from the realty the fence, would not divest him of his title to it.

By our statute, the duplicate receipt of the receiver, or the certificates of the register, is *prima facie* evidence of title or the right of possession in any action of trespass *quare clausum fregit*, action of right, or other action of law or equity; and such certificate or receipt is to have the same effect in law in establishing possession as a deed of conveyance or a patent. Rev. Stat., p. 387, § 1.

The plaintiff, then, upon introducing his register's receipt, exhibited, for the purpose of maintaining the action, a good title to the land upon which the fence was located, and consequently a right to have and enjoy all the fencing upon the land covered by the register's receipt. Nor would the fact of the defendants having made rails and erected the fence upon the land supposed to be their own, but which upon survey is found to belong to another, change the rights of the parties. Although in a new country like Iowa, where claims are made and fences built in many instances before the land is surveyed, the principle of law, that where a man enters land, he enters all the improvements upon it, may and often will operate oppressively; still, a doctrine so well settled in the books cannot be made to yield to particular emergencies. The rule applies with rigor to those who honestly supposed they were building a fence upon their own land, which, however turns out upon survey to have been government land. But the principle involved in this case has been well settled by the authorities. In the case of *Goodrich v. Jones*, 2 Hill, 142, it was held that fencing materials on a farm, which had been used as part of the fence, but temporarily detached without any intention of diverting them from their use as such, were a part of the freehold, and passed by a conveyance of the farm to the purchaser.

In the case of *Blair v. Worley*, 1 Scam., 173, although there was a statute giving the right to remove fences made by mistake upon the land of others, yet the court decide that the statute has no relation to a case where a

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fence is erected upon lands of the United States or of the state.

The court also decide that the purchaser of land from the government of the United States acquires all the improvements made upon it anterior to his purchase. In that case Worley erected a fence upon certain public lands. Blair afterwards purchased the same, and took and removed the fence. Worley sued him in trespass. It was claimed that as Worley erected the fence on the tract described through *mistake*, believing it to be on the adjoining tract, of which he was the proprietor, he was entitled to the rails. This position was sustained by the court below, but the decision was reversed by the supreme court.

A case entirely analogous to the one at bar is found in *Seymour v. Watson*, 5 Blackf., 555. The parties were proprietors of adjoining fields. The defendants purchased the land of the United States, and before his lines were run, and while plaintiff's land was vacant, enclosed his field with a rail fence made with his own rails, and in doing so he placed a part of the fence on the land of the *United States*, which the plaintiff afterwards purchased. The defendant moved the fence from the land of the plaintiff to his own land. The plaintiff sued and recovered. The court say, "that the defendant having placed the fence in question on the land of another by mistake, does not alter the matter; it was no less a part of the freehold for that reason. Being the property of the United States, in consequence of its annexation to the soil, it passed to the plaintiff by virtue of his purchase of the land on which it stood."

As these authorities are not questioned, they must be decisive of the case before us. The authority cited by counsel for defendant in error, in case of *Wincher v. Shrewsbury*, found in 2 Scam., 283, is not in point. In that case the plaintiff had made from timber growing on public land a quantity of rails, and left them piled upon the land. The defendant afterwards purchased the land of the government, and converted the rails to his own use.

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It was held that they did not pass with the land. The court decide that as the trespass was committed anterior to the purchase, that the government was entitled to an action either in trespass or trover, and that the rails, when not put into a fence nor intended for that purpose, would not pass by alienation.

From the general and well established principle of law that a fence attaches to and becomes a part of the freehold when erected, and follows the tenure of the soil, (and although built upon the land of another by mistake, the rule remains the same,) it follows, as a necessary result, that the plaintiff in this case, when he purchased the land upon which the fence was situated, became the owner thereof, and the defendants were trespassers in removing it, or the rails which composed the fence at the time of the purchase.

Judgment reversed.

P. & J. M. Smith, for plaintiff in error.

L. Clark, for defendants.



WRIGHT *et al.* v. WATKINS.

A decree in bankruptcy, under the general law of Congress, ordered by a court of competent general jurisdiction, cannot be collaterally drawn in question.

The territorial district courts were invested with full power to adjudicate causes in bankruptcy.

Nothing should be presumed against the authority or proceedings of a court of general jurisdiction.

ERROR TO JACKSON DISTRICT COURT.

Opinion by GREENE, J. An action of assumpsit on a promissory note by Wright & Jackson against Wm. Watkins.

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The defendant pleaded bankruptcy under the general law. To this plea there was a special replication in confession and avoidance, averring that the petition, schedule and affidavit in the bankrupt proceedings were so defective that the court could not entertain jurisdiction upon them. These papers appear to have been drawn up in the usual form adopted by our territorial courts in bankrupt proceedings, it therefore is not necessary to describe them. They appear to have been definitively acted upon by a court of competent general jurisdiction; to have resulted in a full discharge and certificate of bankruptcy, and cannot therefore be thus collaterally drawn in question for the alleged irregularities. We say the proceedings were before a court of competent jurisdiction, as they were entertained by the district court of Jackson county under territorial organization. Under the act of Congress, that court was invested with full power to adjudicate causes in bankruptcy, and as it was a court of general jurisdiction, nothing should be presumed against its authority and the regularity of the proceedings. These should be presumed until the contrary appears. By the bankrupt law the discharge is made conclusive evidence in favor of the bankrupt, unless impeached for fraud or wilful concealment by him of his property or rights of property. Rev. Stat., § 4. The law contemplates no other ground of impeachment. The irregularities complained of can by no means be entertained in a collateral proceeding like the present.

We conclude that the court below did not err in giving force to the certificate in bankruptcy, upon the record as it appears before us.

Judgment affirmed.

Van H. Higgins, for plaintiffs in error.

P. Smith and D. F. Spurr, for defendant.

Bush v. Chapman.

BUSH v. CHAPMAN.

Where suit is brought on a written or special contract, it must regulate plaintiff's right to recover, as well as the amount recovered.

Where plaintiff sued for work done pursuant to a written contract, and filed no bill of particulars, it is error to admit evidence to show that he had sustained damages in consequence of delays occasioned by defendants failing to furnish the materials promptly.

By claiming the benefit of a special contract, and making it the *gravamen* of his action, the plaintiff is precluded from recovering damages for delay, &c.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by WILLIAMS, C. J. Assumpsit for \$1000 damages in the district court of Dubuque county. The plaintiff filed his declaration, setting forth, as the gravamen of his action, a special contract made by himself and the defendant Bush, on the 24th day of July, 1849, by which it was agreed that the said Chapman was to do the millwright work of a flouring mill for the said John D. Bush, in the stone building erected for this business in the city and county of Dubuque, state of Iowa. Bush was to furnish all the materials for the same. The mill was to consist of two pair of three and a half feet French burr mill stones, now on the premises. Chapman was to do all the work that was necessary, in a good and workmanlike manner, and to have the mill in order for grinding by the 1st of October next thereafter; then to have an extension of time to complete work that would not interfere with the grinding and making of flour. In consideration of which, Bush was to pay Chapman \$900, in the following manner, to wit: One half to be paid as the work progressed, and the other half when the work was complete. The plaintiff avers, that he was ready and willing to keep and perform his part of the agreement, as made between him and the defendant; but that the defendant failed, on his part, to furnish proper materials, so as to enable him to

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complete the millwright work at the time agreed upon; and that, nevertheless, he did finish and complete all of the work, so as to be ready for grinding on the 1st day of February, 1850. The declaration proceeds in the same count to specify what materials, necessary to the completion of the work in the time appointed by the agreement, the defendant Bush had failed to furnish, to enable the plaintiff to progress with the work; the manner of his failure, and the injury sustained by the plaintiff in consequence of that failure; and claims damages therefor, \$1000. The second count is for work and labor done, materials furnished at the instance and request of Bush, and for damages sustained by plaintiff by reason of a failure to furnish necessary materials, &c. Common counts for work and labor done and performed, and *quantum meruit*, are added, with the averments of undertaking and promising to pay, &c. In the district court a verdict was rendered, and judgment entered thereon, in favor of plaintiff, for the sum of \$260.75 cents, and costs.

Several questions were presented on the trial, and decided by the court below. Exceptions were taken by the defendant's counsel. A motion to set aside the verdict and for a new trial was also made and overruled.

As the case is presented upon errors, we consider it necessary to notice but one. We will let the others stand, as they have been decided by the court below, deeming them legally adjusted.

The third point made by the counsel for the plaintiff in error is, that the court below erred "in admitting evidence adduced by the plaintiff to show that he had sustained damages in consequence of delays occasioned by the defendant's failing to promptly furnish the plaintiff with materials for the erection of said mill, when the plaintiff had declared on a written contract, and when he had filed no sufficient bill of particulars."

The bill of exceptions shows that this evidence was ruled to be admissible, and was suffered to go to the jury. The price of the work fixed by the special and written

contract, the admitted and proven credits of the defendant, and the verdict of the jury, show, by proper computation had, that the jury must have taken this evidence into consideration, so as to give it effect to make it a part of the sum for which the verdict was rendered.

By his declaration, the plaintiff has made the written agreement, as executed between him and the defendant, the gravamen of his action. He avers a complete performance of his part of it, and sues for the price of the work as therein stipulated. He seeks to enforce the payment of the price therein fixed, on the ground that he had, by the 1st day of February, 1850, (some three months after the time set by the written agreement,) completed the work, notwithstanding the failure of Bush to furnish the proper materials at the stipulated time, so as to enable him to proceed with the work as required by the agreement. At the same time, he declares upon the common counts for work and labor done, &c., and thereby claims the benefit of an adjustment of his rights, independent of the written contract, so as to enable him to recover the value of his work upon evidence thereof; and also his damages for hindrance, outlay, loss of time, &c., occasioned by the default of the defendant in not fulfilling his undertaking. This cannot be allowed. If a plaintiff sue on a written or special contract, so as to make it the basis of his action, it must regulate his right to recover, as well as the amount recovered.

In this case it is clear that plaintiff did not consider the written contract, if violated by the defendant, at an end when the failure to perform on his part occurred. But that, on the contrary, he treated it as subsisting, and in force. He proceeded on it, completed the work, and made it the ground of his action at law.

By asserting the binding effect of the special contract, claiming the benefit of it, and making it the gravamen of his action, he is precluded from the recovery of any damages for delay, &c. This doctrine is recognized and asserted

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in Chitty on Contracts, 5 Am. Ed., 570, note 2; reference to *Shaw v. Lewistown Turnpike Road Co.*, 3 Penn., 445. In disposing of this case, chief justice Gibson says, "then, if the company had put it in his power to dispense with the contract by reason of delinquency in the advancement of funds, it was his business either to take advantage of the omission by declaring the contract at an end, or to waive the consequences of the default by treating it as still subsisting. He chose to do the latter, and though it appeared the work had languished for want of the requisite advancements, he continued his services without any intimation of their being rendered on new and implied terms. That he considered the original contract as a subsisting one, appears from his having counted on it. The very work for which he demands compensation was done on the faith of that contract. Would he have been permitted to go on, had he informed the company that he was working under no contract but what the law might imply?" The principle of law here laid down, directly applies to the case at bar, and its application is most forcible. In the case referred to, the plaintiff sued in assumpsit, on a *quantum meruit* count, and treated the special contract as valid and subsisting, and sought to recover on that ground. In the case at bar, the plaintiff not only treats the written contract as subsisting and binding in all its terms, but at the same time claims to recover damages for delay, hindrance, and extra expense in completing the work. By admitting the evidence of damages, thus sustained by the plaintiff, by reason of the default of Bush, the case became duplex in substance, as well as in form, by the declaration, and a verdict is rendered by the jury for the contract price, and damages for the violation of the contract. The action being brought on the written contract, the plaintiff cannot recover damages which are not stipulated for in it. To this effect, *rule 9 Ala.* 106; 11 *idem*, 377; 1 G. Greene, 408; 14 Maine, 364, 1 Shep., 60; 4 Pick., 114; 19 *idem*, 349; Chitty on Contracts, 5 Am. Ed., 741, 742. See also Rev. Stat., 469, § 6, in relation to filing

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the plaintiff's declaration and the copy of the instrument of writing or account, on which the action is brought.

The judgment of the court below is in this erroneous.

Judgment reversed.

B. M. Samuels, for plaintiff in error.

Hempstead & Burt, for defendant.



FRENTRESS v. MARKLE.

A joint debtor has a contingent demand against his co-debtor, which is provable under the fifth section of the general bankrupt law, and is barred by a certificate of bankruptcy; such bankrupt is therefore a competent witness in an action against his co-debtor.

E. and J. executed their partnership note to F.; before the note became due, E. and J. dissolved partnership, and it was agreed that E. should take the goods and credits and pay the debts of the firm. F. approved the arrangement, and promised to return the partnership note, and take in satisfaction the individual note of E., and give J. a receipt; but the old note was not given up, nor was a new note or receipt given; F. sued E. and J., but obtained service and judgment only against E., who was afterwards discharged from the judgment by a decree in bankruptcy; afterward proceedings were commenced by *scire facias* against J. to make him a party to the judgment: held that the agreement between the parties did not show a release to J., or an accord and satisfaction; that it was only an executory agreement.

A release is an executed contract, and must be under seal.

An accord not executed is no bar to an action.

An accord and satisfaction, to constitute a legal bar to an action, must be full, perfect and complete.

In order to have a promise operate as a satisfaction, it must be that of a third person; something over and above the original promise or indebtedness.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by GREENE, J. Proceedings commenced by *scire facias* against John W. Markle, to make him a party to a judgment rendered against his former partner, E. Mattox, on their joint note executed to the plaintiff.

It appears of record in the case, that in 1839, Mattox

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& Markle were partners as merchants, and being indebted to E. Frentress, they executed their joint note for the payment of \$1000. Before the note became due, the partnership was dissolved, and it was stipulated that Mattox should take the goods and credits and pay the debts of the firm. A few months after this arrangement, the parties met, and the plaintiff approved the arrangement, and promised to return the partnership note and take in satisfaction thereof the individual note of E. Mattox, and give Markle a receipt against the partnership note. But the old note was not given up, nor was a new note nor a receipt given. Frentress sued Mattox & Markle in 1840 on the note, and obtained judgment against Mattox, who alone was served with process. In 1843, Mattox was discharged from his debts under the general bankrupt law.

On the trial of this cause, the defendant pleaded the general issue, and on proving the foregoing facts, contended that he was discharged from all liability, and obtained judgment accordingly. One of the objections urged to the proceedings below is, that Mattox was admitted as a witness in Markle's behalf. It is contended that Mattox was incompetent, because he was a party to the note and to the record, and interested notwithstanding his discharge in bankruptcy. We cannot think that he was objectionable as being a party to the original suit upon the note. From that record he had been completely discharged by his bankrupt certificate. But it is contended that Mattox was interested in this suit, because Markle could have no claim on him until after judgment and a satisfaction of the debt, and that if Markle was required to pay the debt, he could then present his demand for contribution against Mattox. This position would be correct if the contingent demand of Markle against Mattox for contribution had not been provable under the general bankrupt law, passed by Congress in 1841. The fifth section of that act allowed "sureties, indorsers, bail, or other persons having uncertain and contingent demands," to prove their claims under

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a commission of bankruptcy. As every joint debtor has a contingent demand against his co-debtor, depending upon his being compelled to pay more than his share of the joint debt, it is clear that such a claim is provable under the fifth section of the act. And according to the fourth section, all provable claims are barred by the bankrupt's discharge and certificate. Consequently, any demand that Markle might have for contribution against Mattox, was barred by his certificate of bankruptcy. His interest, then, could not in this particular be affected by any judgment for or against Markle. He was, therefore, a competent witness. *Dean v. Speakman*, 7 Blackf., 317.

The principal question involved in the trial below remains to be considered. The court charged the jury in substance, that if they believed that Frentress agreed, before the note fell due, to relinquish Markle, and surrender the partnership note given by Mattox & Markle, for a new note against Mattox alone, and that Mattox & Markle settled their partnership business on the strength of such agreement, it is in law a discharge of the debt against Markle, and the failure of Frentress to surrender the old note and take a new one, cannot be set up as a reason for enforcing the collection of the original note against Markle.

In the application of these instructions to the evidence, the court must have regarded the transaction either as a release or as an accord and satisfaction. But the instructions themselves show, that it was merely an executory agreement, which could have no binding force in either of those particulars. As a release, it is essentially deficient. It is not under seal, not even in writing, and imports no consideration. In *Dillingham v. Estill*, 3 Dana, 21, it was held that a release is an executed contract, and must be under seal. This decision, however, goes too far, for the weight of authority shows that a seal is not necessary to the validity of a release, unless it pertain to an interest in land, or to a debt due by an instrument under seal, which can only be released by a writing of equal dignity. Co. Litt., 264; 8 Taunt, 31, 596; 7 Blackf., 562.

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But when a release not under seal is admissible, it must acknowledge a consideration. 4 Gilm., 545. Hence, without a seal, and without consideration, there can be no release. 13 John., 87; 17 *ib.*, 169; 1 Cowen, 122.

As the agreement does not amount to a release in law, can it be considered an accord and satisfaction? The agreement was to give up the company note and take the individual note of Mattox in satisfaction. But the agreement was never executed, the satisfaction was never given, and hence it can only be regarded as an executory accord without satisfaction.

It is clear that an accord not executed can be no bar to an action. *Coit v. Houston*, 3 Johns. C., 243; *Watkinson v. Inglesby*, 5 Johns., 386; *Latapeck v. Peckolier*, 2 Wash. C. C., 180; *Russell v. Lytle*, 6 Wend., 390; *Brooklyn Bk. v. De Granio*, 23 *ib.*, 342; *Frost v. Johnson*, 8 Ohio, 393. The accord or agreement to accept satisfaction must be fully executed to form a defence. 3 East., 252; 1 Ld. Ray., 122; Bac. Ab., tit. Accord A; *Woodruff v. Dobbins*, 7 Blackf., 582.

An accord and satisfaction, to constitute a legal bar to an action, must be full, perfect, and complete. This principle is not questioned by any authority. Apply the doctrine of accord and satisfaction to the present case, and upon the important point of satisfaction it will be found entirely deficient. The accord was not only left without execution; it was also left without any consideration. Frentress received nothing in payment, nor did he receive new or additional security. The fact that Mattox & Markle settled their partnership business with reference to this agreement, creates no valid consideration to Frentress. He was not a party to that settlement, and derived no benefit from it, nor was Markle injured thereby from his procurement. And although Markle left sufficient means with Mattox to pay half the note, it was far from being a satisfaction to Frentress, especially as the conditions upon which he promised to give up the company note had not been complied with.

But if the agreement had been fully executed, the old note given up, and the note of Mattox accepted with the express understanding that Markle was to be discharged, it might well be questioned whether even this would amount to a legal defence of the partnership indebtedness, unless the Mattox note had actually been paid. Under the arrangement, the security would be decreased rather than increased. It would be substituting a less promise for a greater, one for two. And it is as obvious in reason as it is well settled in law, that to have a promise operate as a satisfaction, it must be that of some third person, or something over and above the original promise or indebtedness.

In *Cole v. C. & E. Sackett*, 1 Hill, 516, C. and E. being partners, gave their note for a debt of the firm, under an agreement that it should be in full satisfaction; and after dissolving, E. agreed, for a consideration received from C. to assume and pay the debt for which the note was given, and accordingly took up the firm note and gave his own in lieu, and it was held to be no bar to a recovery on the original consideration. The opinion in that case was delivered by Judge Cowen, and he deliberately declared the doctrine to be entirely settled, that the promissory note of a debtor, given for a precedent demand, will not operate as payment, so as to preclude the creditor from suing on the original consideration, though given under an express agreement that it should be received in full satisfaction; but otherwise if the note be that of a third person. This doctrine was subsequently reconsidered and approved in *Waydell v. Lucr*, 5 Hill, 448. And in that case, it was held that the giving of a promissory note by one of several partners for a demand antecedently due from all, will not extinguish their liability, though the creditor expressly accept the individual note in satisfaction.

This doctrine is entirely established in New York and New Hampshire, and, with slight exceptions, in the other states of this union.

In England the doctrine that a mere accord, if it be

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binding and afford a new remedy, was for a time considered a bar to an action. *Case v. Barber*, T. Ray., 450; *Milward v. Ingraham*, 1 Mod., 205; *Reed v. White*, 5 Esp., 122; *Evans v. Drummond*, 4 *ib.*, 89. But before the discriminating mind of Lord Tenterdon, this doctrine was found to be deficient in legal principle, and is now nearly obsolete, if not entirely repudiated. *David v. Ellice*, 5 Barn. & Cress., 196; *Lodge v. Dicers*, 3 Barn. & Ald., 610; 5 East., 233; 11 Eng. Com. Law, 201. And Gow. on Part., Am. Ed., 1825, p. 200, thus defines the rule: "When the two requisites of a joint interest and a joint credit concur, nothing but actual satisfaction, or the extinguishment of the original consideration, by the acceptance of a higher security, can invalidate the claim which the creditor possesses against the firm." Apply this rule to the present case, and it obviously follows that the original claim is not invalidated. There was no actual satisfaction, nor was any higher security substituted. In a word, the case at bar does not come up to any of the authorities, English or American, to which we have been referred by counsel for the defendant in error. It may well be considered a legal axiom that a promise to pay a subsisting debt is no consideration, is no satisfaction. How then can a mere agreement to have one joint debtor promise to pay a partnership debt be considered a satisfaction? But in the case at bar it is contended that Mattox & Markle settled their partnership business upon the strength of the agreement that Mattox should pay Frentress, and that it is now unjust to enforce payment of Markle. While we regret the consequences of this decision upon Markle, we cannot disregard the principles of law by which we are governed. Nor can we forget the manifest propriety of the rule that partners are all principals, that each is bound for the debts of the firm *in solido*; that where they have had their creditor's money and eaten their bread at his expense, it is their duty severally and jointly, not merely to promise by their note, and above all by the agreement to give the promissory note of one member of

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their firm, but it justly and legally becomes their duty to repay the money loaned by the plaintiff, or pay the price of his property which was appropriated to their benefit.

We must therefore conclude that the charge to the jury in this case was erroneous.

Judgment reversed.

P. Smith, T. S. Wilson and M. Y. Johnson, for plaintiff in error.

Hempstead & Burt, for defendant.



GRABLE v. THE STATE.

In a criminal case the jurors had been empaneled and sworn, and the case partly submitted to them, when the court adjourned for dinner; during the adjournment one of the jurors separated himself from his fellows; and when the court met, this juror was dismissed and another person substituted: held that this substitution was erroneous.

The statute prohibits the separation of jurors in trials for felonies.

It is error to receive a verdict and render a judgment after the term of a court, as designated by law, has expired, and on a day fixed for a term of the court in another county.

Where a term of court is appointed by law to be held in Clinton county on Monday, and in Scott county on the following Thursday, the term in Clinton county ends on Wednesday evening.

Explains power of the district judge to appoint special terms of court; reasonable notice must be given.

Two terms of the district court cannot be held in one district on the same day.

ERROR TO CLINTON DISTRICT COURT.

Opinion by WILLIAMS, C. J. At the October term of the district court for Clinton county, A.D. 1848, Joseph Grable was indicted and tried for the crime of manslaughter. The jury rendered a verdict of "guilty," and assessed a fine of \$500, to be paid by him to the

state. Upon this verdict the court entered judgment against him; and further sentenced him to confinement in the penitentiary for the term of one year, and to pay the costs of prosecution.

Before final judgment, motions for a new trial, and in arrest of judgment, were made, and overruled by the court. The overruling of the motions for a new trial, and in arrest of judgment, is also assigned for error.

The points of law involved in the instructions, and in the motions for a new trial, and in arrest of judgment, being substantially the same, we will consider them together.

The first error assigned is, that "after the jury had been sworn, and had heard a part of the evidence, one of the jurors was separated from his fellows, and entirely left them."

The second is, that "the court permitted the prosecution to withdraw the said juror, who had been separated from his fellows, and swore another juror in the place of the juror so discharged."

As these two assignments relate to the same subject matter, in the procedure of the court below, and present the entire transaction in connection, we will consider them together.

The trial by jury, as established by our fundamental law, is justly regarded as a shield to the citizen in the enjoyment of his civil rights. It is secured to every man, that he may be fully and fairly protected from unjust and illegal encroachment upon those rights. Originating in times of tyranny and oppression, where the governed were rendered liable to the loss of life, liberty and property at the mere will of those who governed, it has come down to us sanctioned by the approval of the learned, the good and patriotic of many generations, and is adopted by the civilized nations of the earth.

It is now regarded as essential to free government, and is peculiarly adapted to a government founded as ours is, in the sovereign will of the people. A juror is called to

exercise a high and sacred trust, in consideration of his obligation to his country and his fellow citizens. He must, if he will faithfully perform his duty, hear, investigate and decide impartially.

The facts submitted to, and decided by the jury make up the case, to which the judgment of the law is applied, and by which the rights of the parties are concluded.

So important is this feature of our judicial procedure, that the courts of our country have regarded it with the most profound interest and jealousy.

In criminal proceeding particularly, the fullest and most extended opportunity is afforded to the accused for trial by an impartial and unbiased jury.

It has been the constant care of courts to guard the purity of the jury box; and legislatures have provided, by enactment of law, the strictest procedure for the selection and government of jurors, and the requisites to be observed by courts on the trial in view of the rights involved.

In this state the statute provides, that "all issues of fact joined upon any indictment shall be tried by a jury of the courts where such was found." This is identical in substance with the provisions of our constitution, applied to indictable offences. Rev. Stat., p. 155, § 60. By § 62, the right is given to the accused to challenge peremptorily six jurors, where a felony is charged, the punishment of which is not capital; and it is the privilege of the prosecution to challenge half that number. Thus have the legislature by express provision, been careful to mark out the duty of the court and guard the rights of parties. It has been urged here, that the act of the court, by dismissing the juror after he had been sworn, and after he had heard a part of the testimony in the case, on the motion of the prosecutor, where it was not made to appear that he, the juror, had conversed with any person on the subject of the trial, but had merely separated from his fellows, was in derogation of the rights of the accused; and that the calling and swearing of another in his stead,

after the right to challenge had been exercised to exhaustion, was oppressive, and deprived him of his legal protection from wrong. The bill of exceptions does not set forth the fact that the right of the prisoner to challenge was refused by the court upon the introduction of the juror who was called to act in the place of the one who was dismissed. That question is not, therefore, here for adjudication. As the record is, on that point, we must not presume that the court did not refuse to give the prisoner the benefit of the law. But the bill of exceptions shows that the full jury had been sworn, and the trial before them had so far been proceeded in, that a part of the testimony in the case had been heard; that the court adjourned for dinner; that during the adjournment, the juror separated himself from his fellows, and that, on the motion of the prosecutor, made in the afternoon, when the court again was in session, the juror was dismissed, and another sworn and put upon the jury in his stead. In this, we think, the court erred. This proceeding must be regarded as a violation of the requirement of the statute. Rev. Stat., p. 161. "In trials for misdemeanors the court may permit the jury to separate for food and refreshment. But in trials for felonies the jury shall not be separated until there is no prospect of their agreement to a verdict, and it shall be the duty of the court to provide them all suitable refreshments." This being an indictment for a felony, the statute is applicable to it. It is not necessary, in this case, to discuss at length the question whether the separation of the juror from his fellows, after he had been sworn in the case, and the trial had proceeded so far as to hear evidence on the part of the prosecution, is enough to set aside the verdict. We will however say that, in a capital case or for a felony of the magnitude of the case at bar, it has been decided that where, pending the trial, a juror separates himself from his fellow jurors under circumstances which rendered it highly probable that there might have been abuse, or improper conduct, affecting the rights of the parties, the verdict should be set aside.

Smith v. Thompson, 1 Cowen, 221 and note. But our legislature have enacted that, "In trials for misdemeanors, the court may permit the jury to separate for food and refreshment; but in trials for felonies the jury shall not be separated until there is no prospect of their agreement to a verdict, and it shall be the duty of the court to provide them all suitable refreshments." Rev. Stat., 161, § 9. This enactment, in terms not to be misunderstood, expressly prohibits a separation of the jury in trials for felonies; and provides for the comfort of the jury, whilst in custody of the law, for purposes of the trial. Much disquisition by jurists, as to the separation of jurors in its effect upon the verdict, is found in the law books of England and this country. But it is unnecessary to enlarge for the purpose of ascertaining judicially, and establishing, the most reasonable conclusion, as the law-making power of this state has declared it clearly. For this reason, the court might have set aside the verdict if that juror had participated in making it. His exclusion from the box was, therefore, proper. This brings us to the next point in the assignments of error.

It is contended that the court erred in permitting the prosecution to withdraw the juror who had been separated from his fellows, and in calling and swearing another juror in his place, after a part of the evidence in the case had been heard by the jury as at first constituted.

The bill of exceptions shows that such was the procedure of the court. This proceeding is complained of by the defendant as an infringement upon his right of challenge. It appears that the defendant stood upon his legal rights, and remained silent during this action of the court.

We have already spoken of the rights secured by law to the accused in a proceeding for a felony. It is his right by the statute to challenge peremptorily six jurors. The introduction of the new juror without the consent of the accused, might, if suffered to stand as a precedent, lead to injustice, by procuring such change in the panel as would result in injustice to him. Having exhausted his chal-

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lenges before the calling of the new juror, for whose rejection he might have good cause of challenge, by operation of law, he would be obliged to accept him; and thus be materially injured in his right. Besides, such a combination of mind might be thus brought to the adjudication of a case, as would never have been suffered by the party, had his right of peremptory challenge not been exhausted upon a view of the panel as it stood upon the selection, as made when the trial was commenced. The right of the accused, in this respect, we think was infringed by this proceeding. The accused had the right to his challenge of all the jurors. *Stone v. The People*, 2 Scam., 326; *The People v. Goodwin*, 18 Johns., 187.

But the case, as presented and argued here, is affected by a proceeding still more objectionable than that just noticed. It appears by the bill of exceptions, that a part of the testimony of the prosecution had been heard by the jury in the forenoon of the day on which the trial commenced, and when the discharged juror was acting with the jury; that after an adjournment for dinner, in the afternoon, when the defaulting juror had been discharged, a juror was called to act in his stead, and the trial proceeded without recalling the witnesses who had been heard by the jury as at first organized. Such being the fact, as presented, that part of the testimony was not heard by the new juror. The law contemplates the hearing of the evidence by each juror for himself. It is the right of the party that it should be so. A full and fair trial by jury could not be otherwise had. A jealous and strict regard for the integrity of the jury, as legally established, cannot be dispensed with. The law has carefully provided guards in order to the protection of the rights of parties. They must be strictly observed. As far as a part of the testimony was concerned, in view of the law, the defendant was found guilty upon the verdict of eleven jurors. This proceeding was, therefore, erroneous. Upon the introduction of the new juror, the evidence should have been commenced and heard anew. The trial should

have been commenced *de novo*, upon the change of the jury.

The other and only assignment of error which we deem it necessary to notice, is that in relation to the right of the court to be in session and to try causes in Clinton county, on the day upon which this trial was had.

It is contended, that by the law fixing the time for holding the district court in Clinton county, the term ended on Wednesday, and commenced in the adjoining county of Scott on Thursday of the same week. This is true. But in answer to this, the act of the legislature, approved January 22, 1848, entitled "An act to change the times of holding courts in the second judicial district" of this state, is replied. By this act it is provided, that "in the county of Clinton, the time of holding the court shall be on the second Monday after the fourth Monday in April, and first Monday after the fourth Monday in September. In the county of Scott, on Thursdays following the Mondays for holding the courts in Clinton." The same act also provides as follows:

"Sec. 3. The judge of said judicial district (the 2d) shall have power to adjourn the courts required to be held at the regular terms above named, and to hold special terms of court in lieu thereof; and to hold special terms of court in any of the counties of said district whenever in his opinion the public interests may require it; and for a like cause to adjourn the regular term for holding in any one county, and hold a special term of court in lieu thereof in any other county of said district.

"Sec. 4. Whenever a special term of court is held in any county of said district, it shall be in the power and duty of the judge of said district to provide for the trial of criminal, civil or chancery business, and to order process of all kinds to be returnable to said special term, and to require or dispense with the necessity of summoning grand and special jurors at such special terms, as in his opinion, the public good may require; and in all such cases, the order of the judge calling such special court

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shall specify the nature and character of the business to be transacted at said special term."

The bill of exceptions shows that the verdict in the case was rendered by the jury on the Thursday after the Monday on which, by appointment of law, the term commenced in Clinton county, and the first day of the term for Scott county. That on the Friday following, a motion was made to arrest the judgment, whereupon the judge directed the clerk of the Clinton county court to make an entry upon the records of the court in said county, as of the day preceding, "That the district court of Scott county having been adjourned, this court proceeded with the business in Clinton."

We think that the power exercised by the judge of the district court, in this instance, is not warranted by the statute, and might tend to great injustice, by prejudicing the legal rights of suitors. The powers conferred by this special statute are great enough, as expressly given, without extending them by implication still further, so as to dispense with well established principles of practice, which are essential to a just observance of the rights of parties in court. Citizens are presumed to know the law of the land, and they are required to act, in the adjustment of their business, with a reference to its demands. The general law appointing the time and term for holding the court in Clinton county, fixes the time for the commencement of the term—on the second Monday after the fourth Monday in April, and first Monday after the fourth Monday in September; and the term is thereby ended on the Wednesdays succeeding those Mondays in each year: on the Thursdays immediately following, the court commences in Scott county.

The act of January 22, 1848, vests the judge with power to adjourn the courts required to be held at the regular terms above named, and to hold special terms in lieu thereof; to hold special terms in the district, when in his opinion it becomes necessary for the public interests; and for the like cause, to adjourn the regular term, in any one

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county, and hold a special term in lieu thereof. The fourth section of this act, when such special term is held, makes it the duty of the judge to provide for the trial of criminal, civil and chancery business, to order process, &c., returnable to said term, &c.; and in all such cases, the order of the judge calling the special court shall specify the nature and character of the business to be transacted at said special term. This statute, properly construed, certainly does not dispense with the usual notice to those interested, informing them that, instead of appearing for trial at the regular term of the court, they will be required to appear at the special one. It cannot be that, at the last hour of the last day of the term, as fixed by law, the judge is authorized, by an act of his own will, to determine that the court in one county shall be continued in session for business so as to occupy the time set apart by the law of the land for holding the court in another county of the same district, in which he is appointed to preside. Such, we think, was not the intention of the legislature. Such a power is not expressly given. It will not be implied, for the manifest reason that surprise and consequent injustice might be done to parties litigant. Parties whose causes would not be reached in the order of trial on Wednesday evening, being the last day of the regular term, and who after nightfall would depart for their homes, satisfied of the fact that the term was ended, would be liable, by such a determination of the judge, suddenly made and carried into execution, to have their rights disposed of in their absence, without the presence of themselves or witnesses, and without a hearing. If the judge could in this way disregard the termination of the district court in Clinton county, and the commencement of the term in Scott county as fixed by law, in one case, he could in all. But the order of adjournment of the Scott county court was made on Friday, one day after the time fixed by law for holding it had commenced to run; when this fact was presented as an objection to the proceeding in the cause, on the motion to arrest the judgment. The

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adjournment of the court in Scott county was then ordered to be entered as of Thursday, the day previous, *nunc pro tunc*, and the motion overruled. We are of the opinion that this ruling of the court was clearly erroneous. From the constitution of our judicial system, it is apparent that the court cannot be held in two counties, in the same district, on the same day, by one and the same judge. The special statute empowers the judge of that district to adjourn the court in any county from the regular term to any other time, for the convenience of the public; but it does not dispense with the proper order of procedure as to notice. The term in Clinton county having expired on Wednesday evening, and that in Scott having commenced on Thursday, by operation of law, the judge could not, by the making of an order of adjournment *nunc pro tunc*, on Friday following, legalize the proceeding. See *Archer v. Scott*, 2 Scam., 303; *Davis v. Fish*, 1 G. Greene, 406.

The error assigned as to the form of the judgment and sentence thereon, though not in conformity with the law, need not be noticed, as the proceedings must be reversed.

Judgment reversed.

W. E. Leffingwell and *E. Cook*, for plaintiff in error.

Platt Smith, for the state.

REED v. MURPHY & BURKE.

The supreme court is not authorized to grant an injunction upon original petition; but each judge of that court in his separate capacity is empowered to grant injunctions.

IN EQUITY. APPEAL FROM JONES DISTRICT COURT.

Opinion by GREENE, J. In this case an injunction was granted by a judge of the supreme court. The writ

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was made returnable to the district court of Jones county. On motion in that court, the injunction was dissolved, on the ground that the judge granting the same had no jurisdiction in the case. To support this decision, the constitution of the state in defining the powers of the supreme court is relied upon. It provides that this court "shall have appellate jurisdiction only in all cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe. The supreme court may have power to issue all writs and process necessary to do justice to parties, and exercise a supervisory control over all inferior judicial tribunals, and the judges of the supreme court shall be conservators of the peace throughout the state." Art. 6, § 3.

It is very clear that under this clause the supreme court has no original jurisdiction over any case; that the powers of the court are merely of an appellate and supervisory character, and do not extend to the allowance of an injunction upon an original application; but it does not therefore follow that the judges of that court, in their separate capacity, may not be invested with authority which the constitution does not confer upon them as a court. When acting as a court the co-operation of at least two of the judges is necessary; still, by the clause above quoted, the judges are individually authorized to be conservators of the peace, not as a court, but when detached from their court, as judges of the state. Separately, each judge may administer oaths, take acknowledgments, and do other original acts from which they are restrained in their collective capacity as a court. Severally, they may, by virtue of their office, and to the extent authorized by statute, act and decide originally upon an application; but jointly, as a court, they can only act in an appellate and supervisory capacity.

It is provided by statute, that "the several district courts, or any judge of the supreme court in vacation, may grant writs of injunction in cases allowed by the general

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usages of courts of equity." This by no rule of construction can be regarded as in conflict with the constitution.

As the injunction in this case was not allowed by the supreme court, but by a judge of that court in vacation, we conclude that the court below erred in dissolving the injunction for that cause.

Judgment reversed.

P. Smith, for plaintiff in error.

John P. Cook, for defendants.



GRAFT v. DILTZ.

In a case tried in the district court on appeal from a justice, it is error to receive notes in evidence that were not marked as filed by the justice, nor in any way identified by his transcript.

ERROR TO JONES DISTRICT COURT.

Opinion by WILLIAMS, C. J. This suit was commenced before a justice of the peace in Jones county. Judgment was entered against Graft the defendant by default, for \$25.68, with interest and costs. Defendant took his appeal to the district court. The cause was tried at April term, 1850, and a verdict rendered for the plaintiff for \$25, for which sum judgment was entered. On the trial in the district court, several exceptions were taken to the rulings of the judge, by the defendant, in which error is here assigned. There are four assignments of error, but as the plaintiff has relied on only one of these for a reversal of the judgment, it is not necessary that the others should be considered. This assignment is, that "the court erred in overruling the defendant's objection to the notes offered in evidence."

The plaintiff below offered in evidence two promissory

notes, the one calling for \$15.50, and the other for \$8, signed by the defendant Graft. They were offered to prove and establish the plaintiff's cause of action. The defendant urged his objection to the notes as evidence, on the ground that they had not been marked as filed in the case by the justice, nor is there any statement of either of them in the certified record of the case. That therefore they could not be ascertained as showing the same cause of action which was tried by the justice. This objection was overruled by the court, and the notes were read in evidence to the jury. This ruling, we think, was erroneous.

In deciding this question, it is only necessary to turn to the statute enacted for the direction of justices on the subject, and it is easily adjusted. The intention of the legislature is manifest. Rev. Stat., 314, § 1, provides, "Every justice of the peace shall keep a docket, in which he shall enter a brief statement of the nature of the plaintiff's demand, and the amount claimed; and if any set-off was pleaded, a similar statement of the set-off, and the amount claimed."

Section 2, p. 315, is as follows: "The several items in the preceding section enumerated, together with all the other entries specially required by this act to be made in the docket, shall be entered under or opposite to the title of each cause to which they respectively relate, and in addition thereto, the justice may enter any other proceedings had before him in the cause which he may think it useful to enter in such docket."

Section 4 provides, that "in all cases to be tried before a justice of the peace, the plaintiff, when he commences his suit, shall set forth *in writing, and file* with the justice before the suit is placed upon the docket, or process issued thereon, a plain statement of his demand or cause of action." Here it is apparent that, for obvious reasons, it is made the duty of a justice of the peace to keep a docket, and enter therein, in each case, the nature of the plaintiff's demand, and the amount claimed. The second

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section also refers to the subject matter of the entries, and treats of them as being *specially required* to be made in the docket. The fourth section requires in specific terms, that at the commencement of the suit, the plaintiff shall set forth in writing, and *file* with the justice before the entry of the case, or the issuance of the process, a plain statement of his demand or cause of action. The statute, moreover, requires the district court upon an appeal, to try the same cause of action that was tried before the justice, and no other. Rev. Stat., 335, § 15. These provisions are express and conclusive, and dispose of the question at bar. There is no room for implication. The observance of them by the justice, in order to the proper legal procedure, is imperative; without a compliance with them there would be nothing certain, by which the identity of the cause of action before the justice, and that before the district court on the appeal, could be established. Some entry in the docket, and filing of a documentary statement of the demand, is necessary for the purpose of showing jurisdiction. If this were dispensed with, fraud and great injustice might be the result. A plaintiff might bring his suit before the justice for one demand, and upon failure to recover there, take his appeal, and on the trial in the district court resort to another, to sustain his action; or the case might commence in the justice's court on a very small scale, and being appealed, by the time it would be brought forth for trial in the district court, it might assume great magnitude. The design of the statute is to secure identity, and prevent this oppressive expansion in litigation. In the case at bar, there is no mention made in the certified transcript of the justice's record of the notes which were offered in evidence; nor is there any indorsement upon either of them, to show that they had been filed with the papers of the case when it was before the justice. There is no official recognition, or designation of them by the justice, or otherwise, by which they could be identified as the cause of this action when before the justice. This being the state of the case, the district

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court erred in permitting them to go to the jury to sustain the plaintiff's action. This court heretofore has decided where the transcript, as certified to the district court on appeal, contained an imperfect description of the instrument which was offered in evidence, to maintain the action; but where the instrument itself was duly indorsed, with day and date, "filed," and the signature of the justice officially annexed attesting it, that this was sufficient in identification of the cause of action. This, we think, was going quite far enough. It has been urged here, that the notes were found among the papers of the case in the district court, which had been sent up by the justice. This may be so, and still this fact cannot be substituted for those required by the statute. If this were all that might be required, the most ample opportunity would be afforded to practise the impositions and perpetrate the wrongs which the legislature intended to prevent. If the legislature had not guarded this matter by such particular and express provision, it would be necessary that some way should be adopted, in accordance with legal practice, by which, on appeal, the subject matter of the action, and the amount claimed, should be made to appear, to show the justice who tried the cause had acted within his jurisdiction. Although in view of the necessity that exists, in cases of this kind, to look with some indulgence upon proceedings had before justices of the peace, as to the manner and form in which entries required by law may be made, still we cannot approve of and justify an entire omission of a matter so vital to the administration of law and justice.

Judgment reversed.

P. & J. M. Smith, for plaintiff in error.

J. P. Cook, for defendant.

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REED v. MURPHY *et al.*

Where a person contracted to receive a share of the profits in a business as a compensation for services and rent of a building, with no other privilege, and none of the responsibilities of a partner, it was held that he was not a partner.

ERROR TO JONES DISTRICT COURT.

Opinion by GREENE, J. Assumpsit by the firm of Murphy & Burk against Calvin C. Reed. Verdict and judgment for the plaintiffs. There is but one point urged in error which we deem worthy of consideration. On the trial Henry Mahan was admitted as a witness in behalf of the plaintiff. But it was claimed that he was interested as a partner with Murphy & Burk and therefore incompetent. In support of that position, a contract was adduced in which Mahan agreed to rent his house, with the store fixtures, to Murphy & Burk for one year, in consideration of their paying him one dollar, and occupying the building for a store, and giving him one fourth of the profits, if any remained after deducting all the expenses of the establishment. And he also agreed to devote all his time and attention to the business of the plaintiffs. It appeared that Murphy & Burk purchased the goods and furnished the store on their own account; that it was understood between them that Mahan was employed as agent, to be paid for his services out of a portion of the profits. The court charged the jury that this contract did not constitute a partnership between the plaintiffs and the witness.

We think the court correctly instructed the jury that such a contract does not create a partnership. Mahan's connection with the business was not that of a partner; he had no specific interest or control in the business such as a partner ordinarily enjoys; no share of the profits as profits; but merely in the event that profits accrued he should receive a certain portion of them as compensation

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for services rendered as agent or clerk, and not as partner. This question was examined in *Price & Co. v. Alexander & Co.*,* and under the views expressed in that case it is obvious that a person in business may employ another as agent or otherwise, and agree to pay him a share of profits, if any shall arise, as a compensation for his services, without giving such person the rights, or subjecting him to the liabilities, of a partner. In *Burchle v. Eckart*, 1 Denio, 337, a mercantile firm employed a third person to purchase and forward produce under orders of the firm, and have as a compensation for his services one fourth of the profits arising out of the purchase and sale of produce; and it was held that the person thus employed was not a partner in that business even in respect to third parties. The authorities show many exceptions to the general rule that a communion of profits will make men partners and liable for losses; and we think no exception is better reconciled to the cases or more distinctly marked than the present.

Judgment affirmed.

John P. Cook, for plaintiff in error.

Wilson & Smith, for defendants.

DAVIS v. CURTIS.

Where a case is taken to the district court by *certiorari*, and the judgment of the justice is reversed, it is error to order a trial *de novo* in the district court.

ERROR TO JACKSON DISTRICT COURT.

Opinion by WILLIAMS, C. J. This suit was commenced before a justice of the peace in Jackson county, by the

* Ance, 427.

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plaintiff Curtis on an account in assumpsit against Davis. Judgment was entered by the justice in favor of the plaintiff for \$15.50, with interest and costs, on the 20th of June, 1849. On the 7th of July of the same year, Davis the defendant sued out a *certiorari* under the provision of the statute, whereupon the cause was removed to the district court, and heard at May term, 1850. The judgment of the justice was there reversed, and an order for a new trial in the district court, and the cause was continued for that purpose. The defendant Davis took exception to the action of the court by which a new trial in the district court was ordered.

The only question for decision here is, whether, in a proceeding under the *certiorari* law of this state, the district court can, upon the reversal of the judgment of a justice of the peace, order the cause to a new trial before itself?

The act of the legislature regulating the writ of *certiorari*, passed February 9, 1844, authorizes "any person who shall conceive himself injured by error in any process, proceeding, judgment or order, given by any justice of the peace, may remove such judgment to the district court for the same county, at any time within twenty days from the rendition of such judgment," by *certiorari*.

The second section requires the applicant for the writ, his agent or attorney, to file in the office of the clerk of the district court for the proper county, an affidavit stating that in his belief there is error in such judgment, (setting forth the ground of error alleged;) that the application is made in good faith; and requires him to make and execute a bond, with one or more sufficient sureties, to the opposite party, to be approved by the clerk," &c. It is made the duty of the clerk thereupon "to issue a writ of *certiorari*, commanding the justice who rendered such judgment to make return to the district court of his proceedings as to all the facts contained in such affidavit."

The third section provides, that "on the service of writ of *certiorari* to reverse a judgment as aforesaid, it shall be the duty of the party serving the same, to deliver at the

same time to the justice a copy of the affidavit on which the *certiorari* was procured, &c. ; and the justice is required to file his return with the clerk of the district court within five days after the service of the writ."

The fifth section is as follows: "The district court shall after hearing the case give judgment, as the right of the matter may appear, without regarding technical omissions, imperfections or defects, in the proceedings before the justice, which did not affect the merits; and may affirm or reverse the judgment in whole or in part, and may issue execution as upon other judgments rendered before said court." Rev. Stat., art. 9, p. 336.

We have set forth the substance of the enactment on the subject of *certiorari*, so far as the same can be considered as affecting the question before us. As some diversity of opinion in relation to the powers and duties of the district court, in its procedure under this law, has hitherto existed, we will endeavor to establish the practice, by giving it a construction which will operate in consistency with jurisprudence and the design of the legislature.

The justices' act, art. 8, in relation to "appeals and proceedings thereon in the district court," provides that "any person aggrieved by any judgment or decision of a justice of the peace, may, in person or by his agent, make his appeal therefrom to the district court of the same county where the judgment was rendered, or the decision made." Rev. Stat., p. 333.

This act requires the appeal to be made within twenty days after the decision. The seventh section clearly contemplates and provides for a full trial *de novo* in the district court upon the merits. It is as follows: "Upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the justice."

Here then the legislature have, in the most ample pro-

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vision by appeal, afforded to a party who may be aggrieved by the judgment of a justice, an opportunity for redress in the district court, by a trial anew on the merits of his case. This provision, and that for the writ of *certiorari*, stand as articles 8 and 9 of the same act. The article on appeals precedes the other in the arrangement of the law. Being each a part of the same act, it can hardly be presumed that two separate provisions would thus be made to have the same effect, and for the same purpose. Reason, we think, dictates that each was intended for a distinct purpose, in order to different procedure, and judgment in the district court. The provisions of the *certiorari* law forbid the conclusion that it was intended to operate as an appeal on the merits, to be tried *de novo* in the district court. If such were the intention of the legislature, why not provide for the hearing of the testimony of the case at the first term to which the writ is made returnable, and thus supersede the necessity of the delay by a continuance of the cause to another term of the court in case of a reversal, as in the case at bar? These considerations, with others on the score of great inconvenience and vexation to the parties, as well as the public, tend strongly to negative the idea that this proceeding should operate so as to try the right of the matter in controversy between the parties as upon appeal. But strong as these considerations may be, we are not under the necessity of relying upon them alone for a construction of this enactment, as to the powers and duties of the district court under it. We think the fifth section above quoted is sufficiently explicit in prescribing the mode of procedure for the district court. After hearing the case, the court is required to "give judgment *as the right of the matter* may appear, without regarding technical omissions, imperfections or defects in the proceedings before the justice, *which did not* affect the merits, and may *affirm or reverse* the judgment in whole or in part." What is the case upon hearing by this writ? Clearly that which is prescribed only by the transcript of the

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justice, and return made in response to the allegations of error, as contained in the affidavit filed.

The *matter*, the *right* of which is to dictate the judgment of the court, is that of the *case* as made up by the return of the justice, as certified by him. The writ of *certiorari* is expressly given only to correct the "process, proceedings, judgment or orders" of justices of the peace. Then they can only be the legal and conclusive acts of the justice, arising from the facts of the case as considered by him, and which appear in his certified return, that constitute the case as it is in the district court. This is the case, the *merits* of which, as to the *right of the matter* there presented for legal adjudication, are not to be prejudiced or fatally affected by "technical omissions, imperfections or defects of proceeding before the justice." The terms used in the statute, with sufficient perspicuity, designate only a proceeding by the district court in order to revise and correct in a legal manner the "process, proceedings, judgments or orders" of justices of the peace. The proceeding by appeal introduces the case to the district court on its merits, to be tried *de novo*, in law and in fact. The proceeding by *certiorari* takes the case up to be revised and re-adjudicated *as to the right* in matter of law only.

The order of the district court reversing the judgment of the justice is, under the statute, well enough. But by ordering that a new trial should be had in that court, and continuing the cause for trial there, we think the court transcended its powers, and therefore erred. The fifth section of the *certiorari* law expressly directs, "that after hearing the case," &c., the court "may affirm or reverse the judgment in whole or in part." Here the duty of the court is plainly defined. This done, all proceeding on trial in virtue of that writ was at an end. Being a proceeding created by statute, giving jurisdiction to that court for special purposes, so soon as the force and effect of the provisions thereof had been accomplished by the judgment of reversal, no further power remained with the court but that of issuing an execution, "as upon other

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judgments rendered before said court." There are but two ways in which the district court, as constituted, can become possessed of a case, so as to exercise thorough jurisdictional power to try and determine causes to final judgment on the whole merits, in law and fact, in the same hearing. The one is where the proceeding appertains to its original jurisdiction, and the other is by appeal from an inferior tribunal. Without express statutory provisions to that effect, the court could not assume the jurisdiction to force the parties to a *certiorari* proceeding into a trial, in the nature of an appeal, in its own forum. The case was there to be disposed of in compliance with the statute providing for writs of *certiorari*. When so disposed of, the parties were left to such further procedure in the matter as they might elect under the law.

It has been urged, that in this view of the *certiorari* law there is difficulty, because it provides that the judgment of the justice may be reversed in whole or in part, and that, in that event, a proceeding *de novo*, or by *procedendo* before the justice, would be embarrassed, and perhaps impracticable. To this we answer, that the same objection is alike applicable to the hearing anew in the district court. But such a case could not well occur, except where the part quashed or reversed is independent of and unconnected with that affirmed. *Commonwealth v. Carpenter*, 3 Mass., 268; *Same v. Blue Hill Turnpike*, 5 ib., 420; *Same v. Derby*, 13 ib., 433; *Same v. West Boston Bridge*, 13 Pick., 195; *Nicholl v. Patterson*, 4 Ham., 200; *Williams v. Sherman*, 15 John., 195; *Bunson v. Mann*, 13 John., 461. In some of the states, Tennessee, North Carolina and Alabama, where by statute a *certiorari* is considered in the nature of a substitute for an appeal, the party may have a right to a new trial in the court above, both as to the law and the facts. However, in New York, where the statute providing for this writ is in the main similar to ours, it has been decided that the court has no power to remand proceedings in civil cases, but must reverse them *in toto* if erroneous; and that new pro-

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ceedings must be commenced in the inferior tribunal. 10 Wend., 167. In the statute of this state, the power of the revising court, as well as the mode of procedure, is clearly designated. The matter of right, in law and fact, of the case to be tried, consists in the certified return of the justice, and not the whole of the testimony adduced on the trial before him. By it the judgment of the court is also expressly dictated, which is to "affirm or reverse in whole or in part." This done, the power to issue execution remains to be exercised, that the legitimate effect of the judgment may be attained. The statute itself creates the power, prescribes the mode of its exercise, and its extent. It is the duty of the court to expound the law, when made by the legislature, without assuming to aid in legislating. If the law, as it is found to exist, be productive of inconvenience to parties litigant, the difficulty can only be remedied by an appeal to the legislative power. If, however, it be an inconvenience for the plaintiff to be left for the ascertainment and recovery of his rights, upon reversal of his judgment, to his action before the justice anew, he is not remediless, and is only made to suffer the consequences of a due administration of the law. We will only add, that such is the effect of the proceeding by *certiorari* in many of the states, in like cases.

So much of the order of the court as directs this cause to be tried anew in the district court is reversed, and the residue of the judgment affirmed.

Wilson & Smith, for plaintiff in error.

P. B. Bradley, for defendant.

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COFFIN v. KNOTT.

A general demurrer can only prevail against substantial defects. Under such a demurrer no advantage can be taken of merely formal defects.

In an action of replevin, the defendants pleaded in substance that the plaintiff had previously brought an action of trespass, in which he declared for the same property, against the same parties, in which they pleaded a release executed by the plaintiff to one of the defendants; that to the plea of release there was a demurrer, which was overruled, and judgment rendered against the defendants: held that such a plea is good in substance, and that a general demurrer to it should be overruled.

A former action of trespass for taking goods may be pleaded in bar to an action of replevin for the same goods between the same parties; and it makes no difference whether the judgment in the trespass suit was rendered upon a demurrer or a verdict.

An admission by way of demurrer to a plea, in which the facts are alleged, is just as available as though the admission had been made *ore tenus* before a jury.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by GREENE, J. Replevin by John M. Knott against Albert Coffin for two mares and colts. Several pleas were filed by defendant, to which the plaintiff demurred, and the demurrer was sustained. It is now claimed that the court erred in sustaining the demurrer to the sixth plea. By this plea it appears that the defendant purchased the mares and colts of James Burr *et al.*, June 1, 1849; that said James Burr *et al.* took said property from the possession of the plaintiff, September 1, 1848; that afterwards, at the May term of the Clinton county district court, said plaintiff impleaded said Burr and others in "an action of trespass for taking the identical same goods and chattels mentioned in the plaintiff's declaration;" that in May, 1849, the said Burr *et al.* pleaded a plea of release of said action of trespass; that the plaintiff demurred to the plea, and the demurrer was overruled by the court, and judgment was thereupon rendered in favor of said Burr *et al.*, as defendants in the suit; that said judgment remains in full force and effect. The plea concludes with

a prayer for judgment, and that the plaintiff be estopped from maintaining his action against the defendant.

The only question we are called upon to decide in this case is, Did the court err in sustaining the demurrer to this plea? The demurrer is general, and hence can only prevail against substantial defects. Without regard to form, we are only to inquire, Is the plea good in substance? For under a general demurrer no advantage can be taken of imperfections merely formal. Gould's Pl., 466, 468, §§ 15, 19; Stephen Pl., 140; *Ryan v. Watson*, 2 Greenl., 382; *Patchin v. Doolittle*, 3 Vt., 461.

The question arises, Are the substantial facts in the plea such as can be borne down by a general demurrer? The facts set forth are, that the plaintiff in this replevin suit had previously brought an action of trespass, in which he declared for the same property, against the same parties; that the defendants pleaded a release executed by the plaintiff to one of the defendants in bar of the action; and that to the plea of release there was a demurrer, which was overruled, and judgment rendered on the plea for the defendants. But it is contended that the judgment in trespass cannot be pleaded in bar of this replevin suit. Had the plaintiff recovered in the action of trespass, it is clear that he would have been entitled to the value of the horses, which he alleged were taken and converted by the defendants. It is equally clear that a verdict for the defendants, upon an issue involving the right to the property, would vest it in them. Under the plea it might have been shown that the right to the property was necessarily involved in the action of trespass. Indeed, the plea avers in substance that the matter involved in the trespass suit, and the parties thereto, were the same as in the replevin suit. Under the demurrer these averments are admitted to be true, and they sufficiently show that both suits were for the same cause of action.

It is not necessary that both actions should be in the same form, in order to have the former action operate as a bar to the record. It is only necessary that they should

affect the same parties, and involve the same matter, or determine the same cause of action. Suits will be regarded in this light when the same evidence will support both actions. If in this case the former action was instituted to recover for the property, as well as for the trespass upon it, as might have been shown under the plea, then it follows that the same evidence would be admissible to support both actions. This view is supported in *Rice v. King*, 7 John., 20. In this case it was held that a former judgment in trespass for taking goods will bar a subsequent action of assumpsit for the same cause. See also *Johnson v. Smith*, 8 John., 383, *Phillips v. Berick*, 16 *ib.*, 136. So in *Gardner v. Buckbee*, 3 Cow., 120, it was held that this rule prevails, whether the same matter be pleaded, or given in evidence under the general issue; and that the former judgment is conclusive, whether it appear upon the face of the record of the former suit that the same matter was tried and passed upon or not.

It is objected by defendant's counsel, that judgment in the trespass suit, as it appears by the plea, was rendered upon a demurrer, and not upon a verdict. Still the principle and effect of the judgment is the same. The same facts were involved and decided by the demurrer that could have been decided if the case had been submitted to a jury. It can make no difference whether the facts were proved by the release and witnesses, or were admitted by the pleadings. It is decided in *Bouchand v. Dias*, 3 Denio, that an admission by way of demurrer to a plea, in which the facts are alleged, must be just as available as though the admission had been made *ore tenus* before a jury.

In Gould's Pl., 477, § 43, the principle is laid down that a judgment rendered upon demurrer is as conclusive of the facts confessed by demurrer as a verdict finding the same facts would have been. We are not advised that this principle has ever been questioned by any respectable author. It is obvious that the facts in a case may be equally as well established by a demurrer as they can be

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by a verdict; and as in either case they become matter of record, they should never be again contested between the same parties.

The judgment for the trespass suit, as described in the sixth plea, must be regarded as conclusive upon all matters which might have been litigated in that action. If Knott had recovered, he would have secured the value of the horses.

We think, then, that the facts stated in the sixth plea should be regarded as a good bar to the action, and that the court erred in sustaining the demurrer to that plea.

Judgment reversed.

P. Smith, for plaintiff in error.

L. Clark, for defendant.

JACOBSON v. MANNING *et al.*

A bond or note may be sued in the manner provided by the practice act without a declaration. Rev. Stat., 476, § 43.

ERROR TO CLINTON DISTRICT COURT.

Opinion by WILLIAMS, C. J. Manning & Weld, merchants, &c., sued Alfred M. Jacobson in the district court of Clinton county on a promissory note, dated October 28, 1848, for the sum of \$777.83, payable four months after date. The suit was commenced by petition as provided by statute, which enacts, "That when any person holding a bond or note for the direct payment of property or money, shall desire to put the same in suit, he may do so by filing the same with the clerk of the district court having jurisdiction thereof, together with a petition purporting as follows." The statute then proceeds to give

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the form of the petition, in which it requires the "substance" of the bond or note to be set forth, and concludes by praying "judgment for his debt, and damages for the detention of the same, together with his costs." Rev. Stat., 476, § 43.

The act also provides, that "the said petition shall stand in the place of a declaration, that the defendant or defendants may appear and plead, and then an issue may be joined as in actions of debt on such bond or note." It further provides, that the statute of jeofails shall apply as in actions of debt heretofore; and that this act shall not prevent persons from suing in the ordinary way. §§ 45, 46.

When the cause was called for trial, the defendant having demurred generally to the plaintiff's petition, the demurrer was overruled; whereupon the defendant, on leave given, pleaded over. The parties waived a jury, and submitted the cause to the court. A judgment was rendered for the plaintiff for \$774.33, and costs.

A writ of error having been sued out to this court, the cause is here on several assignments of error, only one of which we deem it necessary to consider, viz.:

The court erred in overruling the demurrer of the defendant to the plaintiff's petition.

This proceeding under the statute is an innovation upon the common law practice. It is peculiar. When adopted by a plaintiff, if he proceed in the manner and form thereby prescribed, he must be sustained by the courts, however subversive of the common law the procedure may be. It is undoubtedly the right of the legislature to provide the mode of judicial procedure, and change it partially or entirely, as in their wisdom may be deemed best for the public good. When this is done, it is the duty of courts to expound faithfully, and give effect to the law.

Oyer was craved of the note in the court below; and upon the demurrer an objection to the action was raised, because the petition is in debt, and the note filed is a

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simple contract by a promissory note; that therefore the action should have been in assumpsit.

A sufficient answer to this is, that the act of the legislature on which the plaintiff has proceeded, has authorized the bringing of the suit in this form on either a bond or a note. It prescribes the form of the petition. The plaintiff has followed it substantially, indeed strictly. With a due regard for the law-making power, this court cannot require more of a party who has elected to avail himself of this mode of suing. It will only be required of a plaintiff, that he shall observe a strict compliance with the requisitions of the statute, as it is an innovation upon the well established practice of the common law.

Judgment affirmed.

W. E. Leffingwell, for plaintiff in error.

E. Cook, for defendants.



SHAW v. SWEENEY.

Where the bill of exceptions shows that the court below erred in granting a new trial upon a legal proposition, the judgment will be reversed.

It is no defence to an action of slander, that the slanderous words were spoken by the fireside of the defendant, in the presence of but two or three neighbors. This circumstance will not remove the presumption of malice.

Exceptions to the general rule of presumptive malice explained.

ERROR TO JACKSON DISTRICT COURT.

Opinion by KINNEY, J. Shaw sued Sweeney in case for speaking of and concerning him the following slanderous words: "Boys, have you heard about old Shaw's stealing sheep? he has stolen one of Mary's sheep." The defendant pleaded "not guilty." Under the instructions

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of the court, the jury found the defendant guilty, and assessed the damages of the plaintiff at \$168. The defendant moved for and obtained a new trial. The decision of the court ordering a new trial is assigned for error. The following is the bill of exceptions taken by the plaintiff in error to this decision of the court :

“Be it remembered that the defendant moved the court for a new trial, and that the court ordered a new trial on the ground that the verdict was contrary to law in this, that the conversation took place at the house and fireside of the defendant, in a conversation before and in the presence of but two or three of his neighbors.” The court also decide, as appears from the bill of exceptions, “that the words as proved would have been actionable if spoken except at the defendant’s fireside, but being spoken there, the action could not be maintained.”

In ordinary cases, when the court, in the exercise of a sound discretion, grants or refuses a new trial, as has been repeatedly decided by this court, we are not disposed to interfere with that discretion. But when the decision is set out in a bill of exceptions based upon a legal proposition, if the court err in allowing or refusing a new trial, the decision will be reversed. In the case before us, the court granted a new trial upon the ground that the action could not be maintained, as the defendant spoke the words around his own fireside, in the presence of but two or three of his neighbors.

Was this a protection to the defendant? a good and valid defence? and did the time, place and circumstances render the communication privileged and harmless? If not, the words being actionable *per se*, the plaintiff, upon proof of the speaking of the words, was entitled to a verdict, as the law, when words are in themselves actionable, presumes a malicious intent, and therefore express malice need not be proved. 2 Greenl. on Ev., § 418; Starkie on Sland., p. 47.

The court granted a new trial because the defendant was privileged to speak the words in his own domicile, and

although the words were actionable, yet the place and circumstances of speaking them would rebut the legal presumption of malice. In the case of *White v. Nicholls et al.*, 3 Howard, 285, the court lay down the following exceptions to the general rule of presumptive malice:

1. Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship as a caution, or a letter written confidentially to persons who employed A as a solicitor, conveying charges injurious to his professional character in the management of certain causes which they had intrusted to him, and in which the writer of the letter was also interested.

2. Anything written by a master in giving the character of a servant who has been in his employ.

3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.

4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.

“But the term ‘exceptions,’ as applied to cases like those just enumerated, could never be interpreted to mean that there is a class of actors or transactions placed above the cognizance of the law, absolved from the commands of justice. The privilege spoken of in the books should, in our opinion, be taken with strong and well defined qualifications. That the excepted instances shall so far change the ordinary rule with respect to slanderous or libellous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion.”

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In the case of *Cockagne v. Hodgkisson*, 5 Car. & Pa., 543, Baron Parke says, "that every wilful and unauthorized publication injurious to the character of another is a libel; but where the writer is acting in any duty, legal or moral, towards the person to whom he writes, or is bound by his situation to protect the interest of such person, that which he writes under such circumstances is a privileged communication, unless the writer is actuated by malice."

Apply these general principles and definitions to the case at bar, and we cannot come to the conclusion that the words spoken fall within the exceptions, or were in any sense privileged, in consequence of the defendant speaking them in his own domicile. The circumstances under which the slanderous words were used will not rebut the presumption of malice, so as to throw the *onus* upon the plaintiff; if *not*, the plaintiff could maintain his action, and was entitled to a verdict upon proof of speaking the words, unless the defendant could by testimony remove the legal presumption of malice.

A man's fireside ought not to be made the place for the promulgation of slander, but if a person does resort to the domestic circle and in the presence of citizens defames and traduces the character of his neighbor, he should be held responsible to the injured party. He will not be permitted to plead, in bar of the action, that his house was his castle, for the purposes of falsehood and slander. If the doctrine contended for at bar by the defendant in error were to obtain, a person could slander and destroy the fairest reputation with perfect impunity. Reports of the vilest nature against reputation before unsullied, emanating from a malicious heart with corrupt motives, could be put in circulation in a man's own house in the presence of others, and the person whose character was thus traduced and destroyed could have no remedy, because the words were spoken, as in this case, around the defendant's fireside. We should regret to see a doctrine which would open so wide a door for the gratification of the malicious propensities of the human heart, and so sub-

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versive of the social good of the community, seriously tolerated by the courts. The judgment therefore in this case, allowing to the defendant a new trial, is reversed and set aside, and the court below required to enter judgment for the plaintiff below upon the verdict.

Judgment reversed.

Wilson & Smith, for plaintiff in error.

Lovell & Samuels and *P. B. Bradley*, for defendant.

RICKNER *et al.* v. DIXON.

In an action of replevin commenced before a justice of the peace, where the plaintiff fails to prosecute his suit with effect, or adduce any proof in support of his action, the law presumes title to be in the defendant, and it is only necessary for him to prove the value of the property, in order to recover restitution or payment of its value.

ERROR TO DELAWARE DISTRICT COURT.

Opinion by GREENE, J. This was an action of replevin commenced before a justice of the peace by Daniel Rickner, to recover a horse. On giving the security required, the plaintiff obtained possession of the property, but failed to appear at the trial, and thereupon judgment was rendered against him and his sureties for the value of the horse, and for damages. The sureties then took the case by appeal to the district court.

In the district court the case was submitted to a jury, verdict returned for the defendant, and the value of property assessed at \$200. Judgment was rendered accordingly against the appellants, that the property be returned or the assessed value thereof paid to the defendant.

It appears by the bill of exceptions, that on the trial the plaintiff declined to adduce any proof in support of the

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action, and thereupon the defendant proceeded to prove the value of the horse taken from him by virtue of the replevin, without giving evidence of title in the horse. It was claimed that such evidence was necessary, but the court ruled that the only question before the jury was the value of the replevied property; and though requested, the court refused to instruct the jury that the defendant was not entitled to a verdict for the value of the property. In these particulars it is contended that the proceedings below are erroneous.

To support the allegations of error the case of *Harman v. Goodrich*, 1 G. Greene, 13, is referred to; but as that was an action of replevin under a very different statute, we do not consider it applicable. In that case the plaintiff was non-suited, and a jury impaneled pursuant to the statute "to inquire into the right of property and right of possession of the defendant to the goods and chattels in controversy." Rev. Stat., p. 537, § 17. Under this statute it was held that even after a non-suit the plaintiff might prove ownership of the property in himself in order to show that the defendant had no right of property or of possession under the issue. But the statute under which this suit was commenced has no such provision and contemplates no such issue. It provides, that "if a plaintiff in replevin failed to prosecute his suit with effect and without delay, the justice or jury shall assess the value of the property taken and damages for the use of the same," &c.; "in such case the judgment shall be against the plaintiff and his sureties, that he return the property taken or pay the value so assessed, and also pay double the damages assessed for the detention of property." Rev. Stat., p. 338, §§ 8 and 9. It appears that the plaintiff in the present case did fail to prosecute his suit. In such event the law presumes the title to be in the defendant who had possession before the suit. There having been no proof of title in any other person, it follows that the defendant was entitled to restitution, or to payment of its value. That value being the only point at issue or undecided, evidence

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upon any other point was clearly irrelevant and inadmissible. The court below, then, did not err in ruling that evidence of ownership in the defendant was not necessary to entitle him to recover, nor in refusing to instruct the jury that the defendant could not recover the value of the property.

Judgment affirmed.

L. Clark, for plaintiff in error.

T. S. Wilson, T. Davis and F. E. Bissell, for defendant.



HUTTON v. DREBILBIS.

The district court has concurrent jurisdiction with justices of the peace in actions of replevin, when the property claimed is worth less than \$50 ; so in all other actions.

ERROR TO JONES DISTRICT COURT.

Opinion by KINNEY, J. Hutton sued Drebilbis in replevin in the district court of Jones county, to recover a certain bay mare, valued in the writ and declaration at \$50, but appraised at only \$40. The defendant filed a plea to the jurisdiction of the court, alleging the property to be only worth \$40, which he was ready to verify. Wherefore he prayed judgment, as the court could not take cognizance of the action. To this plea the plaintiff demurred, in which the defendant joined. The demurrer was sustained, and the plea adjudged good ; and the plaintiff failing to plead further, a judgment was rendered against him for costs, to reverse which he sued out a writ of error, and assigns for error the decision of the court, that it had no jurisdiction in an action of replevin, where the property claimed was not worth more than \$50.

It was contended in the argument by the plaintiff in error, that the district courts under the constitution have concurrent jurisdiction with justices of the peace in all sums; but the defendant claims that the jurisdiction of a justice is exclusive where the amount claimed is under \$50.

By the Rev. Stat., p. 313, §§ 28 and 29, it is provided, that justices of the peace are authorized and empowered to hold courts for the trial of all actions in debt, covenant, assumpsit, and other actions founded on contract, where the debt or balance due, or damages claimed, shall not exceed \$50. The replevin act gives justices of the peace the right to try actions of replevin where the value of the property claimed shall not exceed the value of \$50. Rev. Stat., p. 337, § 1.

The constitution provides, that the district court shall be a court of law and equity, and have jurisdiction in all civil and criminal matters in their respective districts in such manner as shall be prescribed by law. Art. 6, § 4.

This clause in the constitution confers upon the district court jurisdiction *in all civil* and criminal matters in their respective districts; the manner of exercising that jurisdiction or power is to be prescribed by law. We do not understand by this article that the legislature have the right to limit or restrict the jurisdiction thus conferred upon the district courts by the constitution, but merely to define and regulate the manner in which that jurisdiction shall be employed. The jurisdiction is unlimited as to amount, and extends *to all civil* and criminal matters. There is no amount so large as to be beyond the jurisdictional power of the district courts, nor none so small as to fall beneath it. Justices of the peace, then, have not, and cannot have, *exclusive jurisdiction* to the extent limited by the constitution. So far as their jurisdiction extends, it is concurrent with that of the district courts. If their jurisdiction is exclusive in all sums up to \$50, we do not know why it should not be up to \$100, as the constitution confers upon justices of the peace jurisdiction to that amount.

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But from the constitution it is evident that the jurisdiction, to the extent limited to justices of the peace, may be exercised concurrently by both courts, and not exclusively by either.

The fundamental law of the state has fixed the jurisdiction of the district courts, and it is not within the power of the legislature to change or modify it. Much less can that jurisdiction be restricted by a statute in force anterior to the adoption of the constitution, and when, by express provision in the constitution, only those laws which were not repugnant to it were continued in force. The judgment of the district court is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

P. & J. M. Smith, for plaintiff in error.

Davis & Bissell, for defendant.

GALLOWAY *et al.* v. TROUT.

In an action on a promissory note, where a copy of it is filed with the declaration, no other bill of particulars is required.

No suit should be brought against an estate upon a claim for less than \$25, until the claim has been presented, as required by statute, to the representative of the estate, and payment refused.

A judgment in debt was rendered in an action of assumpsit, and as all other proceedings in the case are regular, it was held that the judgment should not be reversed, but should be corrected conformable to the action.

. ERROR TO JACKSON DISTRICT COURT.

Opinion by GREENE, J. An action of assumpsit commenced by Margaret Trout against John Galloway, administrator of the estate of David Young, deceased. The suit was commenced on a promissory note executed by Young

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during his life to said Margaret, for the sum of \$70. Judgment against the administrator for the amount of the note.

1. On the trial below it was objected that the note should not be admitted in evidence under the general counts in the declaration, because no bill of particulars, except a copy of the note, had been filed with the declaration. In overruling this objection, the court decided that a copy of the note was a sufficient bill of particulars. This decision of the court, under our statute, is correct. It only requires the plaintiff to file his declaration, together with a copy of the instrument of writing or account on which the action is brought. Rev. Stat., p. 469, § 6.

2. The defendant below also objected that he was not liable to an action on the note until it had been presented to the judge of probate for allowance, but the court ruled otherwise.

This objection was founded upon the statute of 1845, § 3, which provides, that before any executor or administrator shall allow or pay any debt demanded as due from the deceased, the person claiming such debt shall make affidavit that nothing has been paid in satisfaction of the same, except what has been credited, and that the sum demanded is justly due. Section 8 of the same act provides, that no demand of a less sum than \$25 shall be presented to the court of probate for allowance until after the executor or administrator shall have refused to allow and class the same. It is contended that under section 3 a party cannot bring suit against the administrator of an estate until the affidavit is made, and the claim presented to the administrator and judge of probate for allowance, as provided by that section. But we can arrive at no such conclusion from our construction of the statute. The affidavit is required chiefly to regulate and limit the power of executors and administrators in allowing or paying claims against estates, and not as a preliminary act to be done before suits can be instituted upon such claims.

But according to section 8, demands for less than \$25 should not be allowed by the probate court until they have been presented to the executor or administrator, and the allowance refused. By this section we think the legislature intended that no suit should be brought against an estate in any court upon a claim for less than \$25, until after the claim, supported by the requisite affidavit, had been presented as required, and the allowance refused by the legal representative of the estate. But this regulation does not extend to claims for more than \$25, and consequently can have no application to the present case, as this suit was brought on a note calling for \$70. In this particular also we think the court below proceeded correctly.

3. Another objection urged is, that the action is in assumpsit and the judgment in debt. The question arises, Will this defect in the form of the judgment justify this court in reversing proceedings which, in all other particulars, appear to have been properly conducted? It is expressly provided by statute, that no judgment shall be impaired or affected for any defect of form contained in the record, entries or other proceeding which might have been amended by the court in which such judgment was rendered, and that such defects and imperfections shall be supplied and amended by the supreme court. Laws of 1844, p. 9, § 30. And by the next section, this court is authorized to give such judgment as the district court ought to have given. The defect in question is one which may, we think, be corrected with great propriety by order of this court. The judgment of the court below will therefore be amended conformable to the action of assumpsit, and affirmed at the cost of the defendant in error.

Judgment affirmed.

Wilson & Smith, for plaintiffs in error.

Bradley & Bangs, for defendant.

WESTBROOK v. WESTBROOK.

By the statute of 1844, all laws were repealed which authorized the issuing of a *capias* and holding to bail in civil suits.

A petition for alimony is in the nature of a civil proceeding in which a *capias* and holding to bail are not authorized.

Where a *capias* is improperly sued out, it cannot be held good as a summons.

ERROR TO JACKSON DISTRICT COURT.

Opinion by KINNEY, J. The defendant in error filed her petition in the court below for alimony. A *capias* was issued, upon which the plaintiff in error was arrested, and gave bail for his appearance to the next term of the court. Upon the appearance of the defendant below, he moved to quash the writ. "The court decided the motion to be correct so far as the arresting of the defendant was concerned, but held that the same was a good writ or notice for the purpose of the suit in all respects except as a *capias* to arrest the person, and ruled that the defendant answer the petition in thirty days." To this ruling of the court the defendant excepted, and assigns the decision for error.

The petition was filed and *capias* issued under section 10 of Rev. Stat., p. 240, which provides, that when the husband is about to abandon or has abandoned his wife, with the intention of leaving the territory, and neglect or refuse to provide for her support, or the support of his children, upon a statement filed, &c., the clerk shall thereupon issue a *capias* to hold the said husband to bail. This statute was approved 20th January, 1843.

By an act approved 14th February, 1844, it is provided, that no person shall, after the passage of the act, be arrested, held to bail or imprisoned, on any original mesne or final process or execution, issued in any civil suit instituted in any court in this territory. A general repealing clause is attached to the act, by which all acts and parts of acts contravening the provisions of the act are repealed. Laws of 1844, p. 26.

This statute not only clearly repealed so much of the

statute of 1843 as authorized the issuing of a *capias* and holding to bail, but in plain and direct terms prohibits an arrest and bail in all civil suits. This was a civil proceeding. The husband in law was bound to support his wife, to maintain with fidelity the marriage contract, and if he refused to afford her that maintenance to which she was entitled, the criminal code was in no manner violated, but he was liable in a civil suit for her support. The liability of the husband, by virtue of the marital relation, was of a high and sacred nature, but still no less a civil liability; and hence, as the statute prohibits the issuing of *capias* and holding to bail in civil suits, the writ in this case was improperly sued out, and the defendant illegally held to bail. But the court quashed the *capias* as a *capias*, and held it good as a summons or *notice* to the defendant. This is error. The writ being absolutely forbidden by law, the defendant was no more in court than if it had never been issued and served. The court acquired no jurisdiction of his person, and should not have ordered him to plead. The writ was void *ab initio*, and could not have been held invalid so far as the arrest was concerned, and valid for the purpose of notice and bringing the defendant into court. A practice so dangerous would lead to the worst of consequences. If it could be tolerated in a case like the one before us, the same practice might obtain in all ordinary civil actions, and defendants could be brought into court upon *capias*, and although the arrest might be adjudged illegal, still the notice would be equivalent to notice by summons. A service by *capias* cannot in this manner be substituted for service by summons. Aside from the inconvenience which would result to party defendants, and the confusion in practice by such substitution, the law will not permit the analogy. Each writ must stand or fall of itself, and the virtues of the one cannot be brought in to sustain the deformities of the other.

Judgment reversed.

Wilson & Smith, for plaintiff in error.

L. Clark and *W. E. Leffingwell*, for defendant.

Knott v. Burleson.

KNOTT v. BURLESON *et al.*

Where proffert is made of a release which had been pleaded, it becomes a part of the plea.

The construction of a release is a question of law to be determined by the court.

Where legal terms are employed in a release, it must be presumed that the parties fully understood the legal import of the words, and the court will give effect to that understanding.

ERROR TO CLINTON DISTRICT COURT.

Opinion by GREENE, J. Trespass *vi et armis* by the plaintiff against the defendants in error. The declaration contains two counts: the one for an asportation of horses and harness, and the other for an assault and battery. The defendants pleaded the general issue, and gave notice that they would give in evidence a release of the cause of action to one of the joint trespassers. *Oyer* of the release was craved, and it appears of record in the following language:

“For value received, I hereby release L. T. Hubbard from all liability to me for damages in consequence of the said L. T. Hubbard being a principal or accessory in a certain riot, and false imprisonment, for which prosecutions are now pending against Shadrock Burleson and others in the district court of Clinton county. Witness my hand and seal, May 18th, 1848.

JOHN M. KNOTT. [Seal.]”

Thereupon the plaintiff demurred to the plea and release, but the demurrer was overruled.

The only question now to be determined is, Did the court below err in deciding the plea of release good? The release comes before us as the only evidence in support of the plea. By making proffert of the release, it became a part of the plea, and the only ground upon which it could be maintained. In order, then, to determine the sufficiency of the plea, it is only necessary to examine the found-

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ation upon which it assumes to rest, and from which it derives its character. In deciding this case, therefore, we are brought at once to the legal construction of the release, and this is clearly a question of law, which the court may determine without the intervention of a jury.

The parties to the release in this case employed legal terms in reference to proceedings at law, and it must be presumed that they fully understood the legal import of the words used, and such should consequently be the construction placed upon them by the court. The language used is unequivocal, it admits of but one interpretation. It extends only to "a certain riot and false imprisonment" then pending against Burleson and others in the district court. It would pervert not only the technical, but the ordinary and plain signification of the release, to apply it to any other action than that of riot or false imprisonment. There is no latitude even implied in the instrument which can justify its extension to any other cause. It has no reference to the action of trespass set forth by the declaration in the present case. Had the release been intended for the proceedings at bar, the reference could have been readily made by taking from the declaration or writ at least the name of the suit. There being no such reference, no connection or agreement between the release and the declaration, we must conclude that the parties intended it as a discharge from some other suit, more clearly adapted to the expressed object of the release.

We conclude, then, that the court below erred in overruling the demurrer.

Judgment reversed.

L. Clark, for plaintiff in error.

Platt Smith, for defendant.

Darling v. Meachum.

DARLING v. MEACHUM.

Where a plea is defective only in form, a general demurrer to it should be overruled.

The words *beyond sea*, in the Michigan statute of limitations, means beyond the limits of the United States.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by GREENE, J. Assumpsit on a promissory note made by Alonzo Meachum to the plaintiff, April 25, 1832. To the declaration nine pleas were filed. The fifth, sixth, seventh and eighth pleas set up the statute of limitations in force upon the note, previous to the act which took effect July 4, 1843. To these pleas a general demurrer was filed and overruled. As the pleas were good in substance, and defective only in form, the general demurrer was correctly overruled. Rev. Stat., 55, § 10.

The ninth plea set up the statute of Michigan, approved May 15, 1820, and averred that the note was given under that statute in 1832, which limited the cause of action to six years from and after the time it accrued; and that defendant continued and resided subject to that law, under the territorial changes from Michigan to Wisconsin and Iowa, until July 30, 1840, when said statute was repealed; and that before said repeal the plaintiff's cause of action was barred.

To this plea the plaintiff filed a replication, averring that he was beyond the sea, to wit, in the state of Illinois, when the cause of action accrued; that he so continued beyond the seas until the repeal of the said act of limitations; and that he did not at any time after the accruing of said cause of action come or return within the limits of Michigan, Wisconsin or Iowa, until within six years before the commencement of this suit.

To this replication the defendant demurred, and the demurrer was sustained. But it is insisted that the demurrer should have been overruled; and that the words

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“beyond the seas” in the Michigan state are equivalent to the words out of the state, or out of the territory. In some of the states the term “beyond sea,” as borrowed from the limitation act of 21 James I., has been construed to mean without the limits of the state. But other states have given the phrase a literal construction, or at least have extended the exemption to such persons only as were beyond the bounds of the United States. This construction is more in accordance with the signification of the words, and is sanctioned by the ruling of the English courts, which held that the term has a meaning synonymous with that of *beyond* or *out of the realm*; and hence it was held that Scotland is not beyond sea from England.

So in this country the several states should be regarded as within the same realm. They are under the same general government, the same general system of jurisprudence, and under the same federal courts which will entertain the suit of the absentee against the resident debtor. The several states are also united under the same post-office system and by the same telegraphic wires, thus affording every facility for discovering the residence of debtors. Why, then, should a forced and foreign construction be given to the act in order to furnish a saving clause in favor of non-resident creditors? It cannot, we think, be safely argued that such was the intention of the legislature. No such intention can be legitimately drawn from the language of the act. If it had been entertained, it could have been readily expressed. Laws of Michigan, 1820, p. 572, § 10. This section of the statute we think clearly explains itself by the words, or “without the United States.”

In Pennsylvania a similar statute has been construed to mean beyond the United States. *Thurston v. Fisher*, 9 Serg. & R., 288. So in Connecticut, the term “over sea” received a literal construction. In *Gustin v. Brattle*, Kirby, 299, it was held that absence at Halifax, though without the jurisdiction of the United States, is not beyond sea.

In Ohio the courts construed the phrase to mean out of

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the state, but in *Whitney v. Webb*, 10 Ohio, 515, the correctness of that construction appears to be questioned. Judge Grimke, in delivering the opinion of the court, remarks: "I cannot help thinking, however, if the question were a new one, that it would better promote the ends of justice and public tranquillity to say, as the courts of Pennsylvania have, that the statute referred simply to persons beyond the bounds of the United States."

In *Whitney v. Goddard*, 20 Pick., 304, it was held that a citizen of another state is not beyond sea, and not therefore within the saving clause of this statute. See also 13 N. H., 80; 14 Peters, 141; 11 Wheat., 361.

We conclude, then, that the court did not err in sustaining the demurrer to the replication.

Judgment affirmed.

Wilson & Smith, for plaintiff in error.

Davis & Bissell, for defendant.



LEVINS v. SLEATOR.

A divorce granted by the Iowa territorial legislature is good, if it does not appear to have been granted for causes over which the district courts have jurisdiction; and such divorce will bar the right of dower as effectually as if the divorce had been decreed by a court.

ERROR TO DUBUQUE DISTRICT COURT.

Opinion by GREENE, J. This was an action of right commenced by Ann E. Sleator against Thomas Levins for an undivided third of lots 51, 52 and 53 in the city of Dubuque, which she claimed as dower under her deceased husband. The defendant's plea denied plaintiff's right to any portion of the lots.

The case was submitted to the court upon the following

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statement of facts: That the plaintiff was lawfully married to David Sleator in February, 1836; that said Sleator was owner in fee simple of the lots in question during cohabitation; and that said Sleator departed this life some time in the year 1848.

On the part of defendant it was admitted by plaintiff that, upon the application of David Sleator, the legislature of the territory of Iowa passed an act, on the 16th day of February, 1843, divorcing the said David Sleator from the bonds of matrimony contracted with the plaintiff.

Upon these facts the court decided that the plaintiff was entitled to dower in the lots, and gave her judgment accordingly.

To reverse this decision it is now contended that the legislature of Iowa had the right to grant divorces; and that a divorce thus granted will bar the right of dower.

1. Had the legislature power to grant the divorce? By the organic law, Rev. Stat., 32, § 6, it is provided, "That the legislative power of the territory shall extend to all rightful subjects of legislation." This language is general and comprehensive, and shows that our territorial legislature was invested with as much power at least as is enjoyed by the most unrestrained state legislatures. The power to pass general divorce laws has been exercised by every state legislature in the union. Many of them have passed special acts of divorce upon individual applications, and have granted divorces with such facility, and upon such meagre showing, as to supersede the necessity of judicial action in such cases. But however much this power may have been abused by legislative bodies, it is generally conceded that the state and territorial governments have complete control and discretion over the subject of divorce. It is a subject that can be regulated by no other than the legislative department of government. Our courts have no inherent common law control over the matter. All the authority they can exercise in granting a divorce must be derived from legislative enactment. In England, from whence we derive our common law, a mar-

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riage, valid in its commencement, cannot be dissolved for any cause without a special act of Parliament. 1 Black. Com., 441.

In Maryland, Virginia and South Carolina, no divorce is granted but by special act of the legislature, according to the English practice. But in Virginia the facts constituting the ground for divorce are usually referred to judicial investigation.

While in a colonial condition, the courts in this country had no authority to grant divorces; and after the states became independent, there was no lawful mode of obtaining divorces but by virtue of general or special legislative enactment. This power was exercised by the legislature of New York by passing special acts until 1787; at which time a law was passed giving authority to the court of chancery to pronounce divorces *a vinculo* in the single case of adultery. Thus the legislature of that state necessarily retained the power of granting divorces in all other cases which might be considered justifiable by a majority of the members. So with our territorial courts and our territorial legislature. Without authority from the legislature our territorial courts had not the power to grant divorces; without such authority the power could only be exercised by the legislature, and if it could not be exercised by our legislature, it clearly could not be exercised by any department of our territorial government. But it is conceded that the power did exist in the territory; hence, as the power was not given by Congress to our courts, as they were invested with no other than general common law authority, as the legislature was the supreme power of the territory, and was invested with all the authority usually exercised by legislative assemblies, it necessarily follows that the power to grant divorces could only be exercised by the legislature until the district courts were authorized to do so by the passage of the divorce law. The courts could then only grant divorces for the causes enumerated in the act. For those causes, then, the proceedings were authorized to be judicial. The power

to grant divorces in the cases enumerated was transferred from the legislature to the district courts. As legislative interposition was no longer required, as the courts were invested with ample authority in such cases to decree divorces, the power of the legislature to entertain concurrent jurisdiction might well be questioned. Where the courts are authorized to grant divorces, the matters to be investigated are of a judicial nature, and the jurisdiction ought to be confined to the courts.

Upon this point Chancellor Kent remarks: "The question of divorce involves investigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be confined exclusively to the judicial tribunals under the limitations to be prescribed by law." 2 Kent Com., 106.

The legislative and judicial departments of the territory were separate and independent. It was not within the province of either to encroach upon the duties and authority of the other. Even in cases where the legislature have not invested the courts with authority to grant divorces, an act ordering a divorce is not exclusively an exercise of legislative power. Although the act may be done in the form of legislation, and in the usual manner of passing a law, still the parties affected, the subject matter submitted, the question to be investigated and the decision made, are in every respect assimilated to judicial proceedings, and should be addressed to the exercise of judicial power. If, then, this power in the legislatures of the several states had not been generally recognized by the courts of this country, if so many divorces had not been granted by legislative action, and if the domestic relations and rights of property resulting from such divorces would not be deranged to an alarming extent by the decision, we should at once unite in the conclusion that the legislature had not authority to grant a divorce in any case. Still we are of the opinion that the legislature has not the authority to assume judicial power, by granting divorces for such causes as the courts have

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authority to adjudicate. But it does not follow that they may not grant divorces for other justifiable causes which are not enumerated in the law. The grounds upon which the divorce at bar was granted are not shown. As the contrary does not appear, we must presume that the legislature acted correctly, and granted the divorce for other causes than those enumerated in the divorce law.

But it is contended that the act of divorce is in conflict with that clause in the federal constitution which provides that, "No state shall pass a law impairing the obligation of contracts." This point is presented by counsel with much ability, and is supported by many sound arguments. But still we cannot feel authorized to change the uniform current of judicial decision in relation to legislative divorces. That marriage is a contract, and has connected with it an investiture of rights and property, has never been seriously controverted. And still the doctrine appears to be equally well settled that the legislatures of the several states have constitutional power to provide for divorces, on the principle that marriage is a contract of reciprocal obligations, and that they may determine by law what shall amount to a breach on either side, and impose as a penalty the forfeiture of the rights acquired, and a release from the contract.

In 2 Kent's Com., 107, it is remarked, that "it has generally been considered that the state governments have complete control and discretion" in divorce cases. In *Dartmouth College v. Woodward*, 4 Wheat., 518, the chief justice observed that the constitution of the United States had never been understood to restrict the general right of the legislatures of the state to legislate on the subject of divorces; that the object of the divorce was not to impair a contract, but to liberate one of the parties because it had been broken by the other. Another of the judges expressed an opinion to the same effect, and remarked, that "a law punishing a breach of a contract by imposing a forfeiture of the rights acquired under it, or dissolving it,

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because the mutual obligations were no longer observed, was not a law impairing the obligation of contracts.”

Chancellor Kent assumes that in ordinary cases the constitutionality of the laws of divorce, in the respective states, is not to be questioned.

In *Starr v. Pease*, 8 Conn., 541, it was adjudged that the legislative divorces *a vinculo* for causes, were constitutional and valid. Under these authorities, we must conclude that the legislative divorce obtained by Sleator is constitutional.

2. The remaining point to be considered is, Does this legislative divorce bar the right of dower? It is obvious that a divorce authorized by the legislature has all the validity and force of one decreed by a court. The divorce terminated the relation of husband and wife; consequently A. E. Sleator, at the death of David Sleator, could claim no benefit from his estate from that relation. She was not his wife; in that particular she was legally dead, and consequently could acquire no dower in his land upon his demise.

After the divorce, D. Sleator may have married a second wife; and if she had survived him as his wife, her right of dower to his real estate could not be questioned. It will hardly be claimed that there could be two rights of dower in the same estate.

It matters not whether the divorce is legislative or judicial, the same consequences and forfeiture must ensue from either. As this point is virtually conceded in the argument, it is unnecessary to enlarge upon it. We are of the opinion that the court below erred in not admitting the legislative divorce as a bar to the action.

Judgment reversed.

P. Smith and B. M. Samuels, for plaintiff in error.

W. J. Barney, T. Rogers, S. Hempsted and James Burt, for defendant.

NOTE.—Other cases decided in 1850, but in which opinions were subsequently delivered, will appear in the third volume.

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A

ACCORD AND SATISFACTION.

1. E and J executed their partnership note to F; before the note became due E and J dissolved partnership, and it was agreed that E should take the goods and credits, and pay the debts of the firm. F approved the arrangement, and promised to return the partnership note, and take in satisfaction the individual note of E, and give J a receipt; but the old note was not given up, nor was a new note or receipt given. F sued E and J, but obtained service and judgment only against E, who was afterwards discharged from the judgment by a decree in bankruptcy; afterward proceedings were commenced by *scire facias* against J, to make him a party to the judgment: held that the agreement between the parties did not show a release to J, or an accord and satisfaction; that it was only an executory agreement. *Frentress v. Mar-ble*, 553
2. A release is an executed contract, and must be under seal, *ib.*
3. An accord not executed is no bar to an action, *ib.*
4. An accord and satisfaction, to constitute a legal bar to an action, must be full, perfect and complete, *ib.*
5. In order to have a promise operate as a satisfaction, it must be that of a third person; something over and above the original promise or indebtedness, *ib.*

ACCOUNT.

1. An item in an account, designated as a "cash balance on settlement, \$50," is sufficiently specific. *Chambers v. Games*, 320

ACTION OF RIGHT.

1. The "act to allow and regulate the action of right," provides a remedy to recover the possession of land, and also a remedy to determine the title. *Kerr v. Leighton*, . . . 196
2. To enable the plaintiff to recover in an action of right, it should appear that the defendant acted as owner, landlord or tenant of the property claimed; and if as tenant, that he was in possession, . . . *ib.*
3. Where the defendant pleads to an action of right, in the form provided by statute, he virtually admits himself in possession. As possession is not denied by such a plea, it need not be proved, *ib.*
4. If plaintiff seeks to recover more than nominal damages for withholding the premises in an action of right, proof of the time and circumstances becomes essential, *ib.*
5. In an action of right, the jury returned a verdict, "We find the plaintiff entitled to no part of lot, &c., at this time, but is entitled to \$32.50 damages; and that the defendant is entitled to and took possession of the lot under color of title:" held that on such a verdict a judgment might be rendered,

and that the plaintiff might recover upon a less title than that set forth in the declaration. *Olive v. Daugherty*, 393

ADMISSION.

1. An admission by way of demurrer to a plea, in which the facts are alleged, is just as available as though the admission had been made *ore tenus* before a jury. *Coffin v. Knott*, 582

AFFIDAVITS.

See JURORS, 1.

AGENT.

See NOTICE, 9.

AGREEMENT.

1. Plaintiff agreed to do work for defendant, and take land for payment. Defendant contracted to make a good title to the land, on the performance of the work, but the title was not in him: held that plaintiff was at liberty to rescind the contract, and was not obliged to do the work, and that if he did the work, he was entitled to payment as on a cash contract to do work. *Fitch v. Casey*, . . . 300
2. Where a grantor reserves a house, rails, &c., which were on a strip ten rods wide and one hundred and sixty rods long, on the west side of the quarter section of land sold, but the house, &c., were afterwards found to be a short distance east of the ten rod strip, it was held that the grantor was entitled to the house. *Goreny v. Hinton*, . . 344
3. Course and distance should yield to natural and artificial objects, which are made part of the description of land, *ib.*
4. In construing contracts, that which is most natural and certain, and most conformable to the intention of the parties, should prevail, *ib.*
5. In an action upon an agreement, with mutual and dependent conditions, the plaintiff, to sustain his

demand, must account for all he undertook under the agreement, and the defendant, to sustain his set-off, must establish each item of his demand by proof. *Springer v. Stewart*, 390

6. A written agreement between D and F, stipulated that D should furnish certain kinds of goods at 25 per cent., and other kinds at 10 per cent. advance, and concluded with the stipulation: "All goods billed at 25 per cent. payable in six months, at 10 per cent. in four months, by adding 10 per cent. interest:" held that the interest should be charged on the goods furnished at 25 per cent. as well as on those furnished at 10. *Davis v. Fish*, 447
7. An agreement stipulated that the defendant should build a house in a certain manner, and have it completed on or before the 1st day of March, 1845, for which the plaintiff paid \$400 down, and was to pay \$600 on the said 1st day of March. In an action on the agreement for failing to complete the house within the time and in the manner specified, the declaration averred, that the plaintiff was ready and prepared to pay according to the effect of the agreement: held that the declaration was good without alleging the payment, or an offer to pay the \$600. *Lucas v. Snyder*, 490

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APPEARANCE.

1. Where a party before a justice of the peace moves for a continuance of the cause and for a change of

venue before objecting to the summons, such acts will amount to a general appearance, which cures all defects in the form and service of process. *Shaffer v. Trimble*, 464

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1. An attachment is vacated by a judgment of nonsuit against the plaintiff. *Brown v. Harris*, 505
2. Where a nonsuit is set aside, and a new trial granted, the attachment lien vacated by the nonsuit is not revived, . . . *ib.*
3. If the plaintiff in an attachment suit before a justice of the peace recovers a judgment for less than \$5, it does not follow that he is liable on the attachment bond. *Bradley v. McCall*, . . . 214
4. In an attachment suit before a justice, the demand cannot be less than \$5, but the judgment may, *ib.*
5. In a suit commenced by attachment, a general judgment was rendered, and upon it a special execution issued, on which the property attached was sold. held that the sale was valid. *Corriell v. Doolittle*, . . . 385
6. An attachment will hold all chattels, moneys or evidences of debt, or any interest which the debtor may have in them. *Robinson v. Moriarty*, . . . 497
7. The second section of the attachment act, which authorizes an issue and jury trial of the facts upon which the attachment issued, is not repealed by the amendatory act of 1846. *Lewis v. Sutliff*, . . . 186

ATTESTATION.

1. Where the certificate of a judge is not dated, but is preceded and followed by certificates of the clerk, the first dated on the 18th, and the other on the 31st of July, the defect is cured. *Lewis v. Sutliff*, 186
2. In a writ under seal, the seal should be named or referred to in the attestation. *Riggs v. Bagley*, 383

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ATTORNEY.

1. Where an attorney is appointed by the court to defend a pauper prisoner, the county is liable for his fees. *Hall v. Washington Co.*, . . . 473
2. *Whicher v. Cedar Co.*, 1 G. Greene, 217, overruled, . . . *ib.*
3. The supreme court is not authorized to grant a lien upon a judgment for an attorney's fees, as it would be an exercise of original jurisdiction. *Preston v. Daniels*, . . . 536

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AWARD.

1. Affidavits may be admitted in support of a motion to recommit an award to arbitrators, and if no objection was raised to the affidavit in the district court, none will be entertained in the supreme court. *Depew v. Davis*, . . . 260
2. An award may be recommitted under the statute, where a legal and sufficient reason is given. A reason that will justify an arrest of judgment, or a new trial, will justify a recommitment, . . . *ib.*
3. An award should not be rejected unless a want of jurisdiction is apparent in the arbitration, *ib.*
4. An award may be recommitted on the ground of newly discovered evidence, . . . *ib.*

B

BANKRUPTCY.

1. A decree in bankruptcy, under the general law of Congress, ordered by a court of competent general jurisdiction, cannot be collaterally drawn in question. *Wright v. Watkins*, . . . 547
2. The territorial district courts were invested with full power to adjudicate causes in bankruptcy, *ib.*

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BASTARDY.

1. A proceeding against the father for the support of his illegitimate child is not in the nature of a criminal action, and therefore under the constitution the defendant is exempt from imprisonment; and that portion of the bastardy act which authorized such imprisonment is repealed by the constitution. *Holmes v. The State*, . 501

BILL OF PARTICULARS.

1. Where a bill of particulars is as definite as the nature of the transaction will permit, it is sufficient. *Mix v. Ely*, . . . 513
2. In an action on a promissory note, where a copy of it is filed with the declaration, no other bill of particulars is required. *Galloway v. Trout*, . . . 593

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1. An instrument not under seal is not a bond. *Steamboat "Lake of the Woods" v. Shaw*, . . . 91
2. An instrument with all the other requisites of a bond, is not one unless signed and sealed by the parties making it. *Cuddleback v. Parks*, . . . 148
3. A recognizance cannot, after an appeal, be converted into a bond by amendment, . . . *ib.*
4. Where the execution returns state "no property found," it is sufficient to justify an action on a replevin bond under the statute requiring a return, "that sufficient property of the plaintiffs cannot be found," &c. *Cameron v. Boyle*, 154

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C

CAPIAS.

1. By the statute of 1844, all laws were repealed which authorized

the issuing of a *capias* and holding to bail in civil suits. *Westbrook v. Westbrook*, . . . 598

2. A petition for alimony is in the nature of a civil proceeding, in which a *capias* and holding to bail are not authorized, . . . *ib.*
3. Where a *capias* is improperly sued out, it cannot be held good as a summons, . . . *ib.*

CERTIORARI.

1. In a case taken to the district court by *certiorari* an affirmance or a new judgment may be rendered "as the right of the matter may appear." *Wright v. Phillips*, . . . 191
2. Where a case is taken to the district court by *certiorari*, and the judgment of the justice is reversed, it is error to order a trial *de novo* in the district court. *Davis v. Curtis*, . . . 575
3. A judgment cannot summarily be rendered against a surety in a case taken to the district court by *certiorari*, as it may be in cases taken up by appeal. *Smith v. Bissell*, 379

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CHANGE OF VENUE.

1. Application for a change of venue may be made to a justice of the peace at any time after the appearance of parties, and before the jury is sworn, or the trial submitted to the justice. *Lyne v. Hoyle*, 135
2. Where a petition for a change of venue sets forth the requisite facts, verified by the affidavit of the party, it is the duty of the judge to grant the change to the nearest county, without any further proof or inquiry. *Cass v. State*, . . . 353
3. The statute of 1845 requires, in criminal cases, the facts stated in the petition to be verified by the affidavit of at least two respectable witnesses, . . . *ib.*
4. If a party complies with the statute, in his application for a change of venue, the court has no discretion to refuse, but should grant the change to the nearest county not made objectionable by the petition, without requiring any other testi-

mony than the petition and affidavit, *ib.*

CLERKS.

See ELECTION, 2.
FEES.

COMMON LAW.

1. A rule of common law is not repealed by implication. *Goodwin v. Thompson*, 329

CONSTRUCTION.

See AGREEMENT, 47.
STATUTE, 5, 6, 7, 8.

CONTINUANCE.

See PRACTICE, 16.

CONTRACT.

See AGREEMENT.

CONVEYANCE.

1. Under the Michigan statute of 1827, in relation to conveyances, an unrecorded deed cannot prevail against a subsequent purchaser, who had his deed recorded first. *Hopping v. Barnum*, 39
2. Under the registry law of 1840 no conveyance is valid except between the parties thereto and such as have had actual notice thereof, until it is deposited for record, *ib.*
3. Deeds executed before the registry act of 1840, should be recorded under it, the same as deeds executed subsequent to the passage of the law, *ib.*
4. A deed for land first filed for record, though subsequently dated, will prevail, *ib.*

See COVENANTS.
DEED.

CORPORATIONS.

1. All acts of incorporation are made public, and as such may be given

in evidence. Such an act creates the presumption that the corporation does exist *de facto*. *Durham v. Daniels*, 518

COSTS.

1. Counties are liable for costs in criminal cases, in which *nolle prosequi* are entered, or in which indictments are quashed, or demurrers to them are sustained. *Bonney v. Van Buren Co.*, 230

COUNTY ORDERS.

1. An action may be maintained against the commissioners of a county, on a general unconditional order drawn by them for the payment of money. *Steel v. Davis Co.*, 469
2. The rule that an order must be presented for payment within a reasonable time, and notice of its dishonor given to the drawer, is not applicable to county orders, . . *ib.*

COURTS.

1. It is the right and duty of the judicial power in the state to declare all acts of the legislature made in violation of the constitution to be void. *Reid v. Wright*, 15
2. The act of 1839, authorizing district judges to hold special terms of court whenever they deem it necessary, was not repealed by subsequent acts passed to fix and change the time for holding court. The eighth section of said act is not repugnant to the organic law nor to the state constitution of Iowa. *Harriman v. State*, . . 270
3. Notice of a special term, as directed by the act of 1839, is not an essential prerequisite to confer jurisdiction. The statute providing for the notice is directory. It will be presumed that the notice was given, even if the record does not state the fact, *ib.*
4. A decision of the territorial supreme court will not be overruled unless palpably erroneous. *Hildreth v. Tomlinson*, 360
5. The act of the legislature creating

- two jury districts, and appointing two different places to hold the district court in Lee county, is not unconstitutional. *Kinney, J., contra. Trimble v. State*, . . . 404
6. Nothing should be presumed against the authority or proceedings of a court of general jurisdiction. *Wright v. Watkins*, . . . 547
7. It is error to receive a verdict and render a judgment after the term of a court, as designated by law, has expired, and on a day fixed for a term of court in another county. *Grable v. State*, . . . 559
8. Where a term of court is appointed by law to be held in Clinton county on Monday, and in Scott county on the following Thursday, the term in Clinton county ends on Wednesday evening, . . . *ib.*
9. Explains power of the district judge to appoint special terms of court; reasonable notice must be given, . . . *ib.*
10. Two terms of the district court cannot be held in one district on the same day, . . . *ib.*

See CERTIORARI.

FRAUD, 2.

JUDGE.

JURISDICTION.

COVENANT.

1. If A covenants to make B a good and sufficient deed, B is not obliged to take the deed, unless A has a good and indefeasible estate in the land covenanted to be conveyed. *Fitch v. Casey*, . . . 300
2. Dependent and independent covenants explained, . . . *ib.*

See PLEADING, 10.

D

DAMAGE.

See ACTION OF RIGHT, 45.

PRAIRIE FIRE.

PRACTICE, 17, 22, 39, 40, 42.

DEBT.

See PLEADING, 1, 15.

DECISION.

See COURTS, 4.

DECLARATION.

See PLEADING.

DECREE.

See BANKRUPTCY, 1.

DEED.

1. A tax deed is not good which conveys more land than was assessed or advertised for the taxes. *Fitch v. Casey*, . . . 300
2. Under the statute, a special covenant at the end of a deed, in which the grantor warrants against all claims from or under him, does not limit or explain the more general warranties which are covenanted by the words, "grant, bargain and sell." *Brown v. Tomlinson*, . . . 525
3. A restraint by implication upon such general warranties is not authorized by statute; it must be positive and expressed, . . . *ib.*

See CONVEYANCE.

COVENANT.

EQUITY, 4.

DEFAULT.

See ERROR, 5.

PRACTICE, 23, 25.

DELIVERY.

1. Where no place is appointed for the delivery of specific articles, the debtor must, before the day of payment, ascertain from the creditor, if practicable, where he will receive the goods. *Phillips v. Cooley*, 456

See TENDER.

DEMURRER.

See PLEADING.

PRACTICE, 1, 2, 3, 27.

DEPOSIT.

See GARNISHMENT, 6.
PARTNERSHIP, 7.

DEPOSITION.

1. Where depositions are taken by the procurement and for the benefit of a prisoner, and are not read to the jury by his counsel, they may be read by counsel for the state, if they were filed and properly in the custody of the court. *Nash v. State*. 286

DETINUE.

1. The action of detinue will lie in Iowa, and may be maintained for a pistol, or any other chattel that may be so identified as to be recovered in specie. *Wright v. Ross*, . 266
2. A statement before a justice of the peace is sufficiently specific in detinue, which describes the property as "a six barreled pistol, called a six shooter or revolver," . . . *ib.*

DESCRIPTION.

1. A defective description of land in a levy is cured by a correct description in the sheriff's deed, when it shows that the land conveyed is the same on which the levy has been made.

See AGREEMENT, 2, 3.
MORTGAGE.

DIVORCE.

1. A divorce granted by the Iowa territorial legislature is good, if it does not appear to have been granted for causes over which the district courts have jurisdiction; and such divorce will bar the right of dower as effectually as if the divorce had been decreed by a court. *Levins v. Sleator*, 604

DOWER.

See DIVORCE.
VOL. II.

E

ELECTIONS.

1. The election in August, 1848, was the second general election under the constitution. *State v. Cudde*, 400.
2. Clerks of the district court and prosecuting attorneys should be biennially elected at the general elections, *ib.*

ELISOR.

See SHERIFF.

EQUITY.

1. If the attorney of a party by fraudulent representations procure his opponent's defeat in court, or if an attorney appear and act for a party without his knowledge or authority, the party injured may be relieved in a court of equity, on the ground of fraud. *De Louis v. Meek*, 55
2. If, in a compromise partition, the petitioners or their attorneys act fraudulently by misrepresentation or concealment, the party injured is entitled to relief in equity, *ib.*
3. Equity will afford relief to those who are indirectly injured by official fraud or misconduct, as well as to those who are directly injured by such fraud. *Austin v. Carpenter*, 131
4. In equity, mistakes in a deed will be corrected, as against subsequent purchasers with notice. *Warburton v. Leaman*, 120
5. Although contracts cannot be changed, they may be corrected so as to enforce the intention of the parties, *ib.*
6. Where funds collected by a sheriff *in jure* were demanded by D and N, and also by P and H, and each party showed an equal right to them, it was held D and N had not a plain and adequate remedy at law, and that they might proceed in equity. *Preston v. Daniels*, 536
7. Where from any defect in the common law, want of foresight in the parties, or other mistake or accident, there would be a failure of

justice, it is the duty of a court of equity to interfere and supply the defect or furnish the remedy, *ib.*

See FRAUD, 2, 3.

HUSBAND AND WIFE, 5.

JURISDICTION, 1, 4, 5.

PLEADING, 1, 2, 3, 4, 5.

SPECIFIC PERFORMANCE.

ERROR.

1. It is not error to preclude an answer to irrelevant or immaterial evidence. *Hopping v. Burnam*, 39
2. The neglect of the court to render a judgment *non obstante veredicto*, on the ground of an insufficient plea, cannot be urged as error, unless a motion was made for such a judgment, and exception taken to the ruling of the court. *Coonrod v. Benson*, 179
3. It is not error to exclude immaterial testimony. *Bradley v. Kennedy*, 231
4. Errors will not be favorably regarded which are based upon the negligence of the party assigning them. *Mears v. Garretson*, 316
5. It is error to render judgment by default against a party, unless he was legally served with process. *Diltz v. Chambers*, 479
6. After the death of a party is suggested, it is error to render judgment against him. *Nelson v. Gray*, 397

See COURTS, 7.

REPLEVIN, 1.

ESTATE.

1. No suit should be brought against an estate upon a claim for less than \$25, until the claim has been presented, as required by statute, to the representative of the estate, and payment refused. *Galloway v. Trout*, 595

See EVIDENCE, 7.

MECHANICS' LIEN, 7, 8.

EVIDENCE.

1. Documentary.

1. A pre-emption certificate not evi-

dence of legal title. *Arnold Grimes*, 77

2. In an action for libel, where M published that R was a defaulter, a mortgage executed by R to the United States, and the record of foreclosure, are admissible as evidence of R's indebtedness to the government. *Roberts v. Miller*, 122
3. Any action by Congress or the departments of government, subsequent to the libelous publication, not admissible as rebutting evidence, *ib.*
4. The certificate of a judge, that the transcript of a record is attested in due form, is authentic evidence of its correctness. *Lewis v. Sutliff*, 183
5. A duplicate receipt or certificate from the receiver or register of a land office, is made by statute *prima facie* evidence of title in actions of trespass, right, &c. *Burlerson v. Teeple*, 542

2. Miscellaneous.

6. Evidence of fraud, covin, or illegality of consideration, is not allowable as defence under the plea of *non est factum*. *Chambers v. Games*, 320
7. In a trial before a probate court, to charge an estate with an old judgment which is claimed to have been satisfied by a levy of property, proof is admissible to show that one of the defendants in the judgment was a security, and that the principal became insolvent after his property was levied upon to satisfy the judgment. *Lucas v. Cassady*, 208
8. In an action of trespass for debauching plaintiff's daughter, if he did not actually connive at the guilty intercourse, evidence of loss occasioned by it will justify a recovery. Proof of careless indifference could only go in mitigation of damages. *Zerfing v. Mourer*, 520
9. To sustain the plea of justification to an action of slander, the testimony of more than one witness, or of one witness and strong corroborating circumstances, are necessary. *Bradley v. Kennedy*, 231

See CORPORATIONS.

ERROR, 1, 3.

NEW TRIAL, 4, 6.

PARTNERSHIP, 3.

& Parole.

10. To establish a plea of want of consideration, parole evidence is admissible to show that a promissory note was given for a patent right to make fanning mills, and that fanning mills made after the model of the right were worthless. *Scott v. Sweet*, . . . 224
11. When a note is so written that it is impossible to tell whether it is dated Jan. or Jun., parole evidence may be admitted to determine the true date; and the fact should be referred to the jury for determination. *Jefferson Co. v. Savory*, 238

4. Prima Facie.

See HUSBAND AND WIFE, 6.
PARTNERSHIP, 2.
SETTLEMENT.

5. Presumptive.

See COURTS, 6.
FRAUD, 3.
PARTNERSHIP, 3.
WILLS, 1.

EXECUTION.

1. Officers of court, or witnesses to whom fees are due, have not the power to order execution on a judgment owned by another. *Hampton, ex parte*, . . . 137

See ATTACHMENT, 5.
LEVY.
SHERIFF'S RETURN, 1.

F**FEEs.**

1. Clerks of the district court are entitled to fees before losing control of their service. *Dickerson v. Shelby*, . . . 460
2. Fees for making out a transcript, may be required before the case is docketed in the supreme court, *ib.*

See ATTORNEY.
EXECUTION.

FELONY.

See JURORS, 9.

FENCE.

1. A fence built upon public land, even by mistake, passes with the freehold to the purchaser from the government; and if such fence is detached from the realty by a wrong-doer, the purchaser's right to it is not divested. *Burlerson v. Teeple*, . . . 542

**FORCIBLE ENTRY AND
DETAINER.**

1. In an action of forcible entry and detainer, an appeal bond is necessary as a condition precedent to an appeal. *Quiddleback v. Parks*, 148
2. In an action of forcible entry and detainer, proof that the party in possession was frightened by threats or other circumstances to yield his possession to the defendant, is sufficient to show that the entry was forcible. *Harrow v. Baker*, 201
3. Threats that induce fear of forcible entry and ouster, without fear of personal violence, are sufficient to establish a forcible entry, . *ib.*

See JUSTICE OF PEACE, 3.
UNLAWFUL DETAINER.

FRAUD.

1. Fraud vitiates the most important judicial acts. *De Louis v. Meek*, 55
2. As a general rule, courts of law and of chancery have concurrent jurisdiction in matters of fraud. Still in many cases chancery will afford relief against fraud, which cannot be remedied at law. *Arnold v. Grimes*, . . . 77
3. At law fraud must be proved; in equity it may be presumed, . *ib.*
4. A patent for land from the United States cannot generally be impeached at law for fraud, . *ib.*
5. If fraud appears upon the face of a patent, it is rendered void at law; but when fraud or other defect arises *dehors* the grant, it is voidable only by suit in chancery, *ib.*

See EQUITY, 1, 2, 3.
JURISDICTION, 1.
PLEADING, 1, 2, 3, 4.

G

GARNISHMENT.

1. One of two joint obligators not liable in a proceeding of garnishment. *Wilson v. Albright*, . 125
2. Judgment cannot be rendered against a garnishee upon his liability before it becomes due, *ib.*
3. Garnishee under no greater liability to his garnishor than he would be to his creditor, . . . *ib.*
4. A garnishee holding a note for collection is not liable as holder of the note, nor on the receipt he gave for the note, without a previous demand and a refusal to deliver up the note and the amount collected on the note, . . . *ib.*
5. Judgment cannot be rendered against a garnishee unless he acknowledge an indebtedness, . *ib.*
6. C was garnisheed in an attachment suit against M, and in his answer it appeared that he had collected funds belonging equally to B and M; that both of them claimed the whole amount, but as they had assigned the claim to him, and he believed the assignment vested in him the money, he divided the amount equally in two packages, placing each by itself; that he had paid to B his half, who at the same time demanded the other half, which he held subject to the order of M; held that the funds remaining in C's hands were subject to the payment of M's debts. *Harlan v. Moriarty*, . . . 486

GRAND JURY.

See INDICTMENT, 5, 6.

H

HALF-BREED TRACT.

1. By an act of Congress, approved June 30, 1834, the qualified interest held by the half-breeds of the Sac and Fox Indians to the half-

breed tract in Lee county, was converted into an absolute estate.

Wright v. Marsh, . . . 94

2. Since the act of Congress of 1834, the half breed lands in Lee county have been subject to the laws and courts of Iowa, to the same extent as other lands owned by individuals, . . . *ib.*
3. The conclusive effect of the judgment of partition of the half-breed lands, as established by *Wright v. Marsh*, *Lee & Delevan*. *Barney v. Chittenden*, . . . 165
4. A majority of the trustees under the articles of association, of the New York Company, have power to convey the title of said company to lands in the "half-breed tract," and the conveyance may be made by themselves, or by their attorney, *ib.*

HUSBAND AND WIFE.

1. A father cannot recover damages against a person for procuring the marriage of his daughter, who in good faith and without force or imposition, entered into a marriage contract between twelve and fourteen years of age. *Goodwin v. Thompson*, . . . 329
2. The statute which provides that male persons of the age of eighteen years, and female persons of the age of fourteen years, may be joined in marriage, is merely cumulative, and does not abrogate the common law rule, which fixes the age of marriage consent for males at fourteen and for females at twelve years of age, . . . *ib.*
3. The right of a husband over his wife is paramount to that of her parent, . . . *ib.*
4. Where the husband and wife jointly contract for the erection of a building on the land of the wife, a mechanics' lien under the statute may be enforced against the property. *Greenough v. Wigginton*, 435
5. Law and equity act in concert, so far as general personal engagements of man and woman are concerned, . . . *ib.*
6. Generally a debt contracted by a woman during coverture is *prima facie* evidence to charge her separate estate. . . . *ib.*

I

INDICTMENT.

1. An indictment is good which substantially follows the language of the statute defining the offence. *Buckley v. State*, . . . 162
2. Not necessary that the indictment should charge the offence in the very language of the statute, if words of the same import and equally comprehensive are used, *ib.*
3. The name of the person to whom counterfeit money was passed should be set forth with certainty in the indictment, unless the name is unknown, and if so, that fact should be stated, . . . *ib.*
4. "State of Iowa" and "The State of Iowa" are substantially synonymous terms. *Harriman v. State*, . . . 271
5. Where an indictment appears to have been exhibited in open court, by the grand jury, and is indorsed "a true bill" over the signature of the foreman, it is conclusive evidence that it was duly found by a legal grand jury, . . . *ib.*
6. The names of the witnesses on whose evidence an indictment is found, should be indorsed on every true bill returned by the grand jury; but they need not be made a part of the record, . . . *ib.*
7. An indictment is good which clearly states all the facts necessary to constitute the crime of murder under the statute. *Nash v. State*, . . . 286
8. An indictment need only state such facts as are required to be proved, . . . *ib.*
9. An indictment upon a statute should state, substantially, if not in the very language of the law, all the circumstances which constitute the definition of the offence in the act. *State v. Chambers*, . . . 302
10. An indictment is good which follows the words of the statute on which it is founded, . . . *ib.*

INJUNCTION.

1. The supreme court is not authorized to grant an injunction upon original petition; but even judge

of that court in his separate capacity is empowered to grant injunctions. *Reed v. Murphy*, . . . 568

INSTRUCTION.

See PRACTICE, 23, 34.

INTEREST.

1. Only that portion of a contract is void which promises more interest than is authorized by the interest law of 1839. *Richards v. Marshman*, . . . 217
2. On a note made under that law to draw 33 per cent. interest, 20 per cent. interest can be enforced, *ib.*

J

JUDGE.

1. A judge cannot act as attorney in a case pending before him. *Wright v. Boon*, . . . 458
2. When a case comes before a judge in which he has been engaged as attorney, he should order a change of venue, . . . *ib.*
3. A judge cannot delegate his power to another, nor can a person be authorized to act as judge by agreement of the parties to a suit, *ib.*

See COURTS.

JUDGMENTS.

1. Void judgments are never binding, but judgments merely voidable may be enforced until reversed by a superior authority. *Reid v. Wright*, . . . 15
2. Judgments from courts of general jurisdiction cannot be collaterally impeached, unless absolutely void upon their face, . . . *ib.*
3. Where the record of a final judgment shows that the subject matter and the parties were properly before the court, the judgment becomes conclusive, and cannot be collaterally impeached. *Wright v. Marsh et al.*, . . . 25
4. No person but the party in whose

- favor a judgment is rendered, his agent or attorney of record, can control or order process to enforce the judgment. *Hampton, ex parte*, 137
5. The judgment of a court of competent and general jurisdiction cannot be collaterally assailed. *Kerr v. Leachman*, . . . 196
 6. Where a power of attorney authorizes a judgment to be confessed for "an amount that may be found due" on the note therein described, and is in sufficient form, in all other particulars, to give the court jurisdiction over the subject matter and the parties, it gives sufficient authority to confess a judgment which cannot be collaterally impeached for mere irregularity. *Patterson v. State of Indiana*, . . . 492
 7. The judgment of a court having jurisdiction of the parties, and the subject matter, is conclusive so long as it remains unreversed, . . . *ib.*
 8. Where a judgment has been assigned, it is not necessary to make the assignee a party by *scire facias*, to enable him to sue out an execution in the name of the party who received judgment. *Corriell v. Doolittle*, . . . 385
 5. The territorial district courts, in dependent of the partition act, had general jurisdiction of partition proceedings both at law and in equity, . . . *ib.*
 6. The jurisdiction of a court can be taken away only by express words, . . . *ib.*
 7. In a court of general jurisdiction, authority will be presumed until the contrary clearly appears, . . . *ib.*
 8. Where, on an appeal to the district court from the judgment of a justice of the peace, it appeared that no judgment was entered by the justice on the verdict of the jury: held that the district court had no jurisdiction of the cause; and that even the appearance of the parties in the supposed appeal in the district court could not confer jurisdiction over the invalid proceedings of the justice. *Kimble v. Riggin*, . . . 245
 9. Appearance will not confer jurisdiction over parties not residing within the jurisdiction of the court, nor subject to its process. *Chapman v. Morgan*, . . . 374
 10. Consent of a party cannot confer a greater authority upon a court than the law affords, . . . *ib.*
 11. The district courts have jurisdiction over all civil and criminal matter arising in their respective districts, . . . *ib.*
 12. The district courts have concurrent jurisdiction with justices of the peace in all sums under \$100. *Nelson v. Gray*, . . . 397
 13. The district court has concurrent jurisdiction with justices of the peace in actions of replevin, when the property claimed is worth less than \$50, so in all other actions. *Hutton v. Drebbilbis*, . . . 593

See ERROR, 2, 6.

PRACTICE, 35, 42.

STATUTE, 3.

JURISDICTION.

1. Courts of law and of chancery have concurrent jurisdiction in matters of fraud. *De Louis v. Meeke*, . . . 55
2. The Iowa territorial district courts were not of inferior jurisdiction. They were invested with the same jurisdiction of a federal character as the circuit and district courts of the United States, and also the general common law jurisdiction usually imparted to state courts of record. *Wright v. Marsh*, . . . 94
3. If the district court in partition proceedings was only authorized to act under the special authority conferred by statute, the jurisdiction would be *quoad hoc* limited and inferior, . . . *ib.*
4. Courts of equity may exercise general concurrent jurisdiction with courts of law in all partition cases at common law, . . . *ib.*

See COURTS.

PARTITION, 3, 5.

JURORS.

1. Affidavits of jurors not admissible to explain their verdict. *Lloyd v. McClure*, . . . 139
2. It is the exclusive province of a jury to decide the facts in a case. *Bradley v. Kennedy*, . . . 231
3. If a case is not submitted to the jury impaneled at a regular term to try the case, a second jury may

- be impaneled for the trial at a subsequent term. *Harriman v. The State*, . . . 271
4. Where the oath required by statute is in substance administered to a jury, it is sufficient, . . . *ib.*
 5. Where the jury are "sworn the truth to speak upon the issue joined between the parties," it is not sufficient in a trial for murder, . . . *ib.*
 6. In examining a juror as to his qualification, he stated, that "he had formed and expressed an opinion from the rumour or report he had heard in his neighborhood soon after the murder was committed; that he had no acquaintance with the defendant, no ill-will or prejudice against him; that he had no personal knowledge of the circumstances of the case; that he had never heard any of the testimony, or conversed with any of the witnesses; that his opinion was conditional; that if what he had heard was true, he had formed an opinion, and if not true, he had formed none:" held that such juror is incompetent. *Trimble v. The State*, 404
 7. In a criminal case the jurors had been impaneled and sworn, and the case partly submitted to them, when the court adjourned for dinner; during the adjournment, one of the jurors separated from his fellows, and when the court met this juror was dismissed and another person substituted: held that this substitution was erroneous. *Grable v. The State*, . . . 559
 8. The statute prohibits the separation of jurors in trials for felonies, *ib.*

See INDICTMENT, 5, 6.
PARTNERSHIP, 1.

JUSTICE OF PEACE.

1. A justice of the peace may determine what townships are within his jurisdiction *ex officio*. *Wright v. Phillips*, . . . 191
2. A substantial compliance with the statute, conferring and regulating the powers of justices of the peace, is all that should be required, *ib.*
3. In an action of forcible entry and detainer, the jurisdiction of a justice is co-extensive with the county, *ib.*
4. The official return of a justice can-

- not be impeached by the mere traverse plea of a party or his attorney, where the record shows no evidence to support it. *Wright v. Ross*, 206
5. A verbal statement of plaintiff's demand before a justice, entered upon his docket and indorsed upon the writ, is all that is required by the statute of 1844. *Taylor v. Barber*, . . . 350
 6. Mere irregularity and deficiency of form in proceedings before justices should be regarded with liberality, . . . *ib.*
 7. An appeal is authorized from the judgment of a justice, and not from the verdict of a jury. *Brown v. Scott*, . . . 454
 8. The intention of a justice to render a judgment without doing so, is not a judgment, . . . *ib.*
 9. The certificate of an ex-justice of the peace, in relation to his proceedings while in office, is not entitled to legal consideration, . . . *ib.*
 10. In a suit commenced before a justice of the peace, a misnomer may be taken advantage of by motion, as well as by plea in abatement. *Hull v. Bennett*, . . . 466
 11. In a case tried in the district court on appeal from a justice, it is error to receive notes in evidence that were not marked as filed by the justice, nor in any way identified by his transcript. *Graft v. Giltz*, . . . 570

See ATTACHMENT, 3, 4.
JURISDICTION, 8, 12, 13.
REPLEVIN, 2.

L

LAND.

1. Two contiguous quarter sections of land may be regarded as one entire tract or possession. *Kerr v. Leighton*, . . . 197
2. A contract by which E agrees to purchase for M at the United States land office a portion of public land upon which M has made valuable improvements, is not repugnant to the act of congress passed in 1830, to prevent fraudulent practices at the public sales of the lands of the United States. *Ellis v. Mosier*, 247

3. Where an agreement is not calculated to prejudice the price and sale of the public lands, it is not affected by the law of 1830, . *ib.*
4. Agreements in relation to improvements and claims on the public lands are recognized by the laws, courts and customs of Iowa, . *ib.*

See DEED, 1.

DESCRIPTION.

FENCE.

HALF-BREED TRACT.

LARCENY.

1. Under the statute, the word "larceny" designates grand larceny, as contradistinguished from petit larceny. *The State v. Chambers*, 308
2. The section of the statute in relation to petit larceny regulates that offence without reference to the preceding sections, . . . *ib.*
3. The word "steal" has a uniform signification, and means felonious taking and carrying away the personal goods of another, . . . *ib.*

LEGISLATURE.

1. The legislature of Wisconsin territory could not curtail rights conferred, nor confer rights withheld, by the ordinance of 1787. *Reid v. Wright*, 15

See DIVORCE.

STATUTE.

LEVY.

1. After levy by execution on goods and chattels sufficient to satisfy the judgment, the defendant in the execution is divested of his right to the property, and the officer making the levy becomes liable to the plaintiff for the debt, if he fail to perform his duty according to the requirements of law, or be released by the plaintiff. *Lucas v. Cassaday*, 208
2. After a return by the officer, that property sufficient to satisfy the judgment has been levied on, the defendant in the execution is *prima facie* discharged from the debt, *ib.*

LIBEL.

See EVIDENCE, 2, 3.

LIEN.

1. A judgment lien will hold against a prior unrecorded deed, without actual notice. *Hopping v. Burnam*, 39

See ATTACHMENT, 2.

ATTORNEY, 3.

WRITS, 2.

LIMITATION OF ACTIONS.

1. The statute of limitations approved February 15, 1843, cannot be pleaded in bar of an action of debt, covenant, &c., within six years after the act commenced running. *Forsyth v. Ripley*, 181
2. The decision in *Norris v. Slaughter*, 1 G. Greene, 338, approved, . . *ib.*
3. The limitation act of 1839 having been unconditionally repealed by the act of 1843, without a saving clause, the time which an indebtedness had run under the old act cannot be included as limitation time under the new act, . . . *ib.*
4. As the limitation act of 1839 had not been in force the requisite period of six years, nor connected with the Michigan act of 1820, it cannot be pleaded as a bar to an action of debt, *ib.*
5. A repealed statute of limitations, under which an action had been barred, should be specially pleaded, *ib.*
6. Statute of limitations approved February 15, 1843, cannot be pleaded in bar to any action of debt, assumpsit, &c., commenced before July 4, 1849. *Hinch v. Weatherford*, 244
7. The statute of limitations approved February 15, 1843, cannot be pleaded in bar to an action of debt within six years after the act took effect. *Gordon v. Mounts*, . . . 243
8. The words *beyond sea*, in the Michigan statute of limitations, means beyond the limits of the United States. *Darling v. Meacham*, 602

See PLEADING, 22.

M**MANDAMUS.**

1. In an application to the supreme court for mandamus on the district judge, affidavits were filed to show that certain facts were proved to the court below which were not certified in the bill of exceptions; to these, counter affidavits were filed: held that in a matter thus susceptible of proof, and within the knowledge and sound discretion of the court below, this court will not interfere by mandamus. *Jamison v. Reid*, 394

MARRIAGE.

See HUSBAND AND WIFE, 1, 2.

MECHANICS' LIEN.

1. The statute in relation to mechanics' liens should be strictly pursued. *Greene & Brothers v. Ely*, 508
2. A petition describing the property and stating the nature of the indebtedness is not sufficient; it should be accompanied with a bill of particulars of the materials or labor furnished, *ib.*
3. The acceptance of a note is not a relinquishment of a mechanics' lien, unless it appears to have been intended as a waiver of the lien, *ib.*
4. A petition for a mechanics' lien set forth that payment was to be made as the work progressed, and at the completion, if any balance was due the plaintiff, it should be paid as might then be agreed: held that this was a sufficient statement of the time of payment by virtue of the contract. *Mix v. Ely*, . . . 513
5. A right to a mechanics' lien is not affected by accepting a note, . . . *ib.*
6. Where a note became due May 1, 1848, and the summons in a proceeding for a mechanics' lien was served March 27, 1849, it was held that the action was commenced within the time required by statute, i.e., within one year from the time payment should have been made, *ib.*
7. In a proceeding for a mechanics' lien, the administrator of defend-

- ant's estate may properly be made a party, and if plaintiff takes a judgment without making the heirs a party, he does it at his peril, *ib.*
8. In a proceeding for a mechanics' lien, rules both of law and of equity are authorized. *Greenough v. Wigginton*, 435

MISNOMER.

See JUSTICE OF PEACE, 10.

MORTGAGE.

1. Where in a mortgage a lot was by mistake designated as 18 instead of 8, and was correctly described in a subsequent mortgage, which was executed subject to the first with notice of the mistake: held that the first mortgage should attach to lot 8, and be regarded as senior to the subsequent mortgage. *Warburton v. Lauman*, 420

MOTIONS.

See PRACTICE, 44, 45.

MURDER.

See INDICTMENT, 7.

N**NEW TRIALS.**

1. Where a verdict has been returned on matters of account, a new trial should not be granted, unless it is apparent that manifest injustice has been done. *Lloyd v. McClure*, 139
2. A new trial should be granted if the verdict is contrary to law and the instructions of the court, *ib.*
3. Unless the contrary appears, it will be presumed that the court exercised a sound discretion in overruling a motion for a new trial, *ib.*
4. A new trial should not be granted on the ground of newly discovered evidence, unless it is of a character calculated to produce a substantial change in the verdict; nor when such evidence, by ordinary dili-

- gence, might have been produced on the trial. *Millard v. Singer*, 144
5. A motion for a new trial is addressed to the sound discretion of the court, and should be refused unless a strong meritorious case is shown, *ib.*
 6. Where a new trial is sought on the ground of newly discovered evidence, the best proof should be adduced to show that such evidence has been discovered, where it is, that it can be had at the proper time, that it is material and not merely cumulative, and that a failure to procure it on the trial was not occasioned by negligence. *Reeves v. Royal*, 451
 7. Where the record shows that the district court granted a new trial, on the ground that the instructions were confused and defective, this court will not disturb the order, *ib.*
 8. Where the bill of exceptions shows that the court below erred in granting a new trial upon a legal proposition, the judgment will be reversed. *Shaw v. Sweeney*, 587

NONSUIT.

See ATTACHMENT, 1, 2.
PRACTICE, 46, 51.

NOTICE.

1. When a nonsuit or default is set aside, notice must be served on the party at least six days before the new trial. But this notice may be waived by general appearance of the party. *Hughes v. Miller*, 9
2. A party cannot object to defective notice after he consents to have a jury called, *ib.*
3. Where actual notice is required by statute, evidence of constructive or implied notice is not sufficient. *Hopping v. Burnam*, 39
4. Actual notice can only be communicated by express information to, or personal service upon the party interested, *ib.*
5. Objection to the sufficiency of publication of notice cannot be taken advantage of collaterally. *Wright v. Marsh*, 95
6. Not necessary to incorporate a copy of notice or proof of publication

- in a record from a court of general jurisdiction; and if not so incorporated, they will be presumed sufficient, *ib.*
7. In proceedings in chancery against non-residents, a brief statement of the object and prayer of the petition must be published for six weeks successively in some newspaper printed in the county where the petition or bill is filed, &c. *Marshall v. Marshall*, 241
 8. The publication is, in contemplation of law, a service of process upon the defendants, and unless made as required by statute, no service is obtained, and the proceedings of the court are *coram non jndice*, and void, *ib.*
 9. Notice to an acknowledged agent is notice to his principal. *Warburton v. Lauman*, 420
 10. It is sufficient notice of special matter in defence of an action under the statute, to state "that the note had been given for a claim of public land, belonging to the government of the United States, on which there was no improvement; or that there was no consideration for the note; or that the consideration had wholly failed." The notice should specially point out the particular matter relied upon in defence of the action. *Chambers v. Games*, 320

P

PARENT AND CHILD.

See BASTARDY.
EVIDENCE, 8.
HUSBAND & WIFE, 1, 3.

PARTITION.

1. The provisions of the partition act can only apply to proceedings within its legitimate power, and not to proceedings *mala fide*. *De Louis v. Muck*, 55
2. Principles of law and equity are united and applied by the partition act of Iowa. *Wright v. Marsh*, 94
3. In partition proceedings the jurisdiction of the district court is threefold: 1. Cumulative and special as created by statute. 2. Having full chancery attributes, except as other-

- wise provided by the act. 3. General common law authority, so far as it could be exercised with the two preceding powers, . . . *ib.*
4. The petition for partition may be verified by the affidavit of an attorney, . . . *ib.*
5. Where the petition contained all the allegations necessary to confer jurisdiction, but omits to describe the interest of unknown owners, the defect cannot be collaterally assailed, . . . *ib.*
6. A slight deviation by commissioners, where it is necessary to an equitable partition of the property, is not fatal to the proceedings. *ib.*
7. The final judgment of partition may properly correct any erroneous computation or inaccuracy in the report of the commissioners, *ib.*
8. A partition of real property under the statute is made complete by the judgment without conveyances, *ib.*

See EQUITY, 2.

JURISDICTION, 3, 4, 5.

PLEADING, 1, 2.

PARTNERSHIP.

1. The existence of a partnership is a question of fact to be determined by the jury, who are alone authorized to decide upon the weight and sufficiency of the testimony adduced to establish the fact. *McMullin v. Mackenzie*, . . . 368
2. The fact that the defendants conducted a smelting business together is *prima facie* evidence of a partnership, . . . *ib.*
3. Where a note is given in the name of a firm, it is presumptive evidence that it was given for a consideration furnished to the co-partnership, and the *onus probandi* lies upon the party seeking to avoid the note, to show that it was given for some other purpose, . . . *ib.*
4. Where A contracts with B for a share of the profits, as such, in any business transaction, he would be considered a partner as to third persons; but where he was to receive a share of the profits as compensation for services, as between themselves, they would not be considered partners. *Price v. Alexander*, . . . 427
5. An instrument under seal, executed by one partner and assented to by the other, will bind both as a firm, . . . *ib.*
6. The rule that one partner cannot bind his co-partner by sealed instruments, does not prevail, if the instrument would be equally valid without seal and within the scope of the partnership business, . . . *ib.*
7. Where C had collected funds for B and M, and paid to B his portion, and where no creditors of B and M as partners claimed the funds remaining in the hands of C, it was held that they were liable for the individual debts of M. *Robinson v. Moriarty*, . . . 497
8. Where a person contracted to receive a share of the profits in a business as a compensation for services and rent of a building, with no other privilege, and none of the responsibilities of a partner, it was held that he was not a partner. *Reed v. Murphy*, . . . 574

PATENTS.

1. If a patent is void upon its face, or was issued without authority, or if the state had no title, it may be collaterally impeached at law; but for the determination of all other defects, resort should be had to a court of equity. *Arnold v. Grimes*, . . . 77

See FRAUD, 4, 5.

PAYMENT.

1. At common law, payment from lapse of time will not be presumed, unless the debt has run twenty years, and the debtor pleads or alleges payment. *Forsyth v. Ripley*, . . . 181

See ACCORD AND SATISFACTION.

DELIVERY.

RELEASE.

PLEADING.

I.—IN EQUITY.

1. A bill to vacate a judgment of par-

- tion for fraud may be in the nature of a bill of review, and may be demurred to for want of equity. *De Louis v. Meek*, . . . 55
2. An allegation of fraud in a bill to set aside a partition is sufficiently specific where it charges that the attorney for plaintiffs in the partition suit entered the appearance of complainant without his knowledge, consent or authority, and thereupon admitted a large amount of spurious, fraudulent and unjust claims to others, which proportionately diminished his share in the property, . . . *ib.*
 3. Where a bill charges actual fraud on the ground of deception, artifice and circumvention, in terms judicially intelligible, it is sufficient, *ib.*
 4. A general allegation of fraud in a bill is sufficient, if so certainly and distinctly stated as to make the subject matter of it clear, . . . *ib.*
 5. If it appears by a bill in equity that complainants had a plain and adequate remedy at law, it is good ground for demurrer. *Preston v. Daniels*, . . . 536
- ## II.—AT LAW.
1. *Declaration.*
 6. In an action of debt on a replevin bond, it is sufficient averment of non-payment where the declaration states, "that no part of said judgment and costs have been paid, and that the whole amount remains due and owing." *Cameron v. Boyle*, 154
 7. If the important averments of a declaration are made with a sufficient regard to the rules of pleading to put the defendant on his defence, they are sufficiently good, . . . *ib.*
 8. Where the county and state are named in the margin of a declaration, and the county is referred to in its body, as "Monroe c'ty," held that the venue was sufficiently stated. *Hicks v. Walker*, . . . 440
 9. In an action of slander, where general damages only such as the law implies from words actionable *per se* are claimed, the declaration need not specify damages, . . . *ib.*
 10. Where the breaches in any court in a declaration in covenant are well assigned, a general demurrer should not be sustained. *Brown v. Tomlinson*, . . . 525
 11. While unmeaning forms should not be enforced, clearness and certainty should be required in pleadings, . . . *ib.*
 12. A bond or note may be sued, in the manner provided by the practice act, without a declaration.—Rev. Stat., 476, § 43. *Jacobson v. Manning*, . . . 585
 See ACTION OF RIGHT, 5.
 AGREEMENT, 8.
 2. *Demurrer.*
 13. General demurrer can only prevail against substantial defects. Under such a demurrer no advantage can be taken of merely formal defects. *Coffin v. Knott*, . . . 582
 14. In an action of replevin, the defendants pleaded in substance that the plaintiff had previously brought an action of trespass, in which he declared for the same property, against the same parties, in which they pleaded a release executed by the plaintiff to one of the defendants; that to the plea of release there was a demurrer, which was overruled, and judgment rendered against the defendants: held that such a plea is good in substance, and that a general demurrer to it should be overruled, *ib.*
 15. A former action of trespass for taking goods may be pleaded in bar to an action of replevin for the same goods between the same parties; and it makes no difference whether the judgment in the trespass suit was rendered upon a demurrer or a verdict, . . . *ib.*
 See ADMISSION.
 3. *Pleas.*
 - 15a. In an action of debt on a note under seal, the plea of *non est factum* is admissible; but as it puts in issue the execution of the note, it should, under the statute, be verified by affidavit. *Chambers v. Games*, . . . 320
 16. A general allegation of fraud in a plea to an action on a promissory note is sufficient. *Hildreth v. Tomlinson*, . . . 366
 17. Pleas averring that one of two payees of a note became bankrupt after the note was made, and before

it was indorsed to the plaintiff, are defective unless they aver that the party who indorsed the note was not authorized to do so; that the note was or should have been set forth in the bankrupt's inventory of assets; and that the note was so held as to be vested by virtue of the decree in the assignee of the bankrupt, or that he otherwise acquired an interest or control over the note. *Fulweiler v. Singer*, 372

18. A general plea that a note was obtained by fraud and circumvention is good. *Strawser v. Johnson*, 373

19. Where profert is made of a release which had been pleaded, it becomes a part of the plea. *Knott v. Burlington*, 600

20. Where a plea is defective only in form, a general demurrer to it should be overruled. *Darling v. Meachum*, 602

See ACTION OF RIGHT, 3.

LIMITATION OF ACTIONS.

NOTICE, 10.

4. Replication.

21. Replication demurrable if it does not traverse the material allegations of the plea. *Roberts v. Albright*, 120

22. Where a statute of limitation is pleaded, which cannot operate as a bar to the action, and a replication is filed, that one of the joint debtors had promised payment within six years, to which replication defendant demurred; it was held, that the demurrer related back to the first mistake in pleading, and that plaintiff was entitled to judgment on the demurrer. *Wile v. Matherson*, 184

POSSESSION.

See ACTION OF RIGHT.

PRACTICE.

I.—IN EQUITY.

1. No motion having been made to amend, a bill may be dismissed and a decree rendered upon the demurrer. *De Louis v. Mack*, 55

2. Upon a general and special demurrer, it is not necessary to make good all the causes of demurrer assigned. If sustained for one out of several causes affecting the whole bill it is sufficient, *ib.*

3. A demurrer puts in issue the entire equity of the bill, and if sustained as to some it should be as to all defendants, *ib.*

4. The objection of a misjoinder of complainants cannot be made for the first time at the hearing, but should be assigned among the causes of demurrer, *ib.*

5. Where a judgment in partition is alleged to have been obtained by fraud, it may be impeached by an original bill without leave of the court, *ib.*

6. The rule that a judgment will not be reversed where the error does not affirmatively appear of record applies to cases at law, and not to appeals in chancery. *Austin v. Carpenter*, 131

7. Evidence will not be considered which is not responsive to the bill or answer. *Shaw v. Livermore*, 338

II.—IN CRIMINAL CASES.

8. American courts have dispensed with many of the stringent rules and nice technicalities which formerly obtained in the English courts in criminal cases. *Harriman v. State*, 271

9. Irregularity in proceedings is waived by pleading and submitting to a verdict without objection, *ib.*

9a. Many legal forms and technicalities possess marked utility in practice, *ib.*

10. A prisoner should be present at his trial, and when the verdict is pronounced, *ib.*

11. Where the record shows that the prisoner was regularly arraigned, that he was brought into court, and took bills of exceptions, it sufficiently shows his presence during the trial, *ib.*

12. A prisoner cannot complain of proceedings which were beneficial to him and in compliance with his request. *Nash v. State*, 236

See DEPOSITION.

INDICTMENT.

VENUE.

III.—AT LAW.

1. *Appeal.*

13. Where an appeal is allowed under a special statute, without a bond as required, it is not error to dismiss the appeal. But if a recognizance had been filed as authorized by a subsequent general statute, the appeal should not be dismissed. *Sb. "Lake of the Woods" v. Shaw*, 19
14. In an appeal to the district court, where the appellant is in default, the judgment of the justice may be affirmed. *Taylor v. Barber*, 350

2. *Certiorari.*

15. A judgment taken to the district court by writ of *certiorari* may be reversed. *Wilson v. Albright*, 125

3. *Continuance.*

16. A motion for a continuance on the ground of absent papers, taken by the attorney of the party applying for the continuance, was correctly refused. *Wright v. Clark*, . . . 86

4. *Damage, Measure of.*

17. Where suit is brought on a written or special contract, it must regulate plaintiff's right to recover as well as the amount recovered. *Bush v. Chapman*, 549
18. Where plaintiff sued for work done pursuant to a written contract, and filed no bill of particulars, it is error to admit evidence to show that he had sustained damages in consequence of delays occasioned by defendants failing to furnish the materials promptly, *ib.*
19. By claiming the benefit of a special contract and making it the *gravamen* of his action, the plaintiff is precluded from recovering damages for delay, &c., *ib.*
20. A party cannot avail himself of his own objections to work done for him and his refusal to accept, as a reason for not paying for it; nor can he give in evidence his own acts and declarations, in order to show that another party has failed in his contract to him. *Crookshank v. Mallory*, 257
21. Where a dwelling frame is defectively erected, but still is of sub-

stantial value to the defendant, for the purpose intended, the plaintiff would be entitled to a compensation, to be ascertained by deducting from the contract price so much as the frame was worth, less than it would have been if completed according to agreement, *ib.*

22. It was not necessary for the defendants to accept the dwelling in order to justify a recovery against them, *ib.*

5. *Default.*

23. Where default is made by the appellant, the judgment of a justice of the peace may be affirmed in the district court. *Wright v. Clark*, 86
24. Where a party appeals from a judgment by default, he may on first appearance in the district court object to the manner or style in which he is sued. *Hall v. Bennett*, 466
25. It is error to render a judgment by default if a plea is on file in the case. *Brown v. Hollenbeck*, 318
26. After a plea is filed the issue should be tried, *ib.*

6. *Demurrer.*

27. Where a demurrer is overruled, and the defendant fails to plead over within the time required by rule of court, judgment may be rendered against him. *Cameron v. Foyle*, 154

7. *Instruction.*

28. By an act approved January 15, 1849, all instructions from district judges to petit juries are to be given in writing. *Pierson v. Baird*, 235
29. That law took effect by publication in newspapers, on 31st January, 1849, *ib.*
- 29a. Courts should know, *ex officio*, at what time laws take effect, *ib.*
30. Where special instructions asked were included in those of a more general character, it was not error to refuse them. *Price v. Alexander*, 427
31. Under the statute of 1849 it is erroneous for a district judge to charge a jury or to modify instructions orally. *Parris v. The State*, 449

32. Legal instructions may be refused and given in a modified form in writing, as the circumstances and evidence of the case may require. *ib.*

33. Where an instruction extends merely to the legal effect and meaning of an instrument, it cannot be objected to as an instruction upon the facts in the case. *Lucas v. Snyder*, 499

34. Where the court instructed the jury in relation to the legal effect of deeds, it cannot be considered a charge upon the facts. *Durham v. Daniels*, 518

8. Judgments.

35. A judgment by default for costs may be set aside and the entire case readjudicated. *Hughes v. Miller*, 9

36. Judgment may be rendered against the security in an appeal bond from a justice of the peace. *Fletcher v. Conly*, 88

37. A judgment will not be reversed for a mere diminution in the record which might have been perfected. *Wilson v. Albright*, 125

38. Judgment cannot be impeached collaterally for mere irregularity. *Cameron v. Boyle*, 154

39. Judgment may be rendered for the penalty named in a bond, as a security for the damages recovered upon the breaches assessed. *ib.*

40. Judgment should not be rendered for a greater amount of damages than is claimed in the declaration. *ib.*

41. A judgment in debt was rendered in an action of assumpsit, and as all other proceedings in the case are regular, it was held that the judgment should not be reversed, but should be corrected conformable to the action. *Galloway v. Trout*, 595

42. Where a judgment is rendered upon a bond, it should be for the amount of the penalty; with an order that an execution issue only for the amount of damages proved to have been sustained by the breaches. *Nelson v. Gray*, 397

43. After a verdict and judgment have been rendered without objection to the complaint, a court should not entertain merely formal defects. *Shaw v. Gordon*, 376

9. Motions.

44. Where two motions are pending at the same time—one by defendant, to affirm for the want of notice, and the other by plaintiff, for leave to withdraw the writ of error—the supreme court will, at discretion, give preference to that motion which the nature and justice of the case may require. *Rogers v. Alexander*, 237

45. Where a party filed a motion in the district court, to affirm, for want of notice, but before the motion was decided filed a demurrer, it will not be considered an appearance or waiver of notice. *Mears v. Garretson*, 316

10. Nonsuit.

46. A nonsuit for failing to reply to pleas, when an issue in fact is joined on another plea, is erroneous. *Roberts v. Albright*, . . . 120

47. A motion for a nonsuit, on the ground of plaintiff's failure to appear, will not be granted, if plaintiff appears before the motion is decided. *Wright v. Phillips*, 191

48. If evidence is adduced which tends, even remotely, to prove facts, which, if established, would support the action, a nonsuit should not be granted. *Wiley v. Shoemaker*, 205

49. If a verdict for the plaintiff would be clearly against the weight and legal effect of the evidence, a nonsuit may be ordered. *ib.*

50. A motion to nonsuit plaintiff after evidence is submitted, is in the nature of a demurrer to evidence. *ib.*

51. A nonsuit should not be granted without the consent of plaintiff, unless the evidence is entirely irrelevant, or has no bearing upon a material point, without proof of which a verdict could not be supported. *ib.*

11. Trial.

52. A trial of the right of property cannot be had, under the statute, after the property has been sold, and possession passed to a third person by virtue of legal process. *Hughes v. Miller*, 9

53. In a proceeding to try the right

- of property taken on execution, a judgment by default against the claimant will authorize the officer to proceed with the sale, . . . *ib.*
54. In an action of right, the plaintiff must recover upon the strength and validity of his own title, and should show a valid subsisting interest in the land. No such interest can accrue from a void judgment. *Reid v. Wright*, . . . 15
55. Not necessary to prove the identity of the drawee of an order before it is offered in evidence. *Fletcher v. Conly*, . . . 88
56. Where a party enters credits upon the instrument sued on, it is not necessary for the defendant to prove them. *Lloyd v. McClure*, . . . 139
57. After going into a trial upon the merits, and the plaintiff has proved his claim for work, the defendant should not be permitted to introduce evidence that the work was done for him and another jointly, in order to avoid the liability. *Hine v. Houston*, . . . 161
58. The omission to join all the parties should be taken advantage of by plea in abatement, . . . *ib.*
59. By going to trial on the merits, without exception to the cause of action, any defect in that particular would be considered as waived by the defendant. *Taylor v. Barber*, . . . 350
60. Where an agreement was entered into "for the purpose of trial before the justice, and in no other court," such agreement should not be used on trial in the district court if objected to by one of the parties. *Rogers v. Alexander*, . . . 443
61. A party is entitled to a jury trial upon an issue of facts, even if those facts had been previously admitted by agreement, or if the party had agreed to submit the case to the court, but had withdrawn the agreement, . . . *ib.*
62. A prosecution for selling spirituous liquors in less quantity than one gallon should be conducted in the name of "The State of Iowa," *ib.*
63. The acceptance of an order becomes liable to the payee named in the order, and mere technical variance will not defeat his liability. *Fletcher v. Conly*, . . . 88
64. Where the transcript of a justice describes a note to be dated April 12, when the note offered in evidence is dated April 2, but is otherwise identified as the note upon which suit was brought, the variance is not fatal. *Rife v. Pierson*, . . . 129
65. A variance between the writ and declaration cannot be taken advantage of by demurrer to the declaration. *Culver v. Whipple*, . . . 365
66. In case of such a variance, the writ may, on payment of cost, &c., be amended so as to conform to the declaration, . . . *ib.*
67. Where there is a manifest variance between the names to a note and the names to a record, the note should not be admitted in evidence. *Hall v. Bennett*, . . . 466

PRAIRIE FIRE.

1. Ordinary caution and honest motives in setting fire to a prairie, and due diligence in preventing it from spreading, is a good defence to an action for damages. *De France v. Spencer*, . . . 462

PROBATE COURT.

1. The probate court, though limited and inferior in power, had complete original jurisdiction in administering the estates of decedents, and any judgment, order or decree upon a subject matter, and between parties over which the court had jurisdiction, cannot be collaterally questioned. *Barney v. Chittenden*, . . . 165

See EVIDENCE, 7.

PROMISSORY NOTES.

1. After a note for a certain sum payable in flour is due, it becomes a cash note, and a demand of payment is not necessary. *Wiley v. Shoemaker*, . . . 205
2. Where a promissory note for a sum certain is payable in leather at the tanyard of the maker, a de-

12. Variance.

63. The acceptance of an order becomes liable to the payee named in the order, and mere technical vari-

- mand of the leather is not necessary. *Games v. Manning*, . . . 251
3. In a suit against the maker of a note, or the acceptor of a bill payable at a specified time and place, it is not necessary to aver or prove a demand of payment, and the same rule is applicable to notes payable in specific property, . . . *ib.*
4. In order to discharge himself from a note payable in specific articles, it is necessary for the maker to show that he had paid, tendered or set apart the property as a payment of the note, . . . *ib.*
5. A demand after a property note becomes due, is a waiver of any previous breach, and gives the maker a second opportunity to pay in property, . . . *ib.*
6. A mere indorsement of a payment on a note is not *prima facie* evidence of payment, nor is it evidence of a new promise to revive a note barred by the statute of limitations, or discharged by a decree in bankruptcy, unless it is shown that the indorsement was made by the defendant, or by his consent, or that he actually paid the amount indorsed. *Viele v. Ogilvie*, . . . 326
7. Under the statute, the signature of an indorser of a note need not be proved, unless it is denied under oath. *Steinhelber v. Edwards*, . . . 366
8. Where a note is made payable in corn on or before a given day, a demand is not necessary. *Phillips v. Cooley*, 456

See BILL OF PARTICULARS, 2.
EVIDENCE, 10, 11.
PARTNERSHIP, 3.
PLEADING, 12, 15, 16, 17, 18.
PRACTICE, 63, 64.

PUBLICATION.

See NOTICE, 5, 6, 7, 8.

R

RECORD.

1. Records of the territorial district courts of Iowa not to be considered as foreign in the state courts of Iowa. *Wright v. Marsh*, . . . 94
2. The record proper in a criminal case, after stating the time and

place of holding court, need only set forth the indictment, properly indorsed as found by the grand jury; the arraignment of the accused; his plea; the impanneling of the traverse jury; their verdict; and the judgment of the court.

- Harriman v. State*, 271
3. Any decision of a court made preliminary to final judgment, is, *per se*, a part of the record; but all other proceedings, such as motions, exceptions, testimony and the like, are no part of the record unless made so by order of the court, by agreement of the parties, by demurrer to evidence, by special verdict or by bill of exceptions, *ib.*
 4. Only such matters as are of record can be brought to the notice and review of this court, . . . *ib.*
 5. A motion, supported by affidavit, is no part of the record unless made so by bill of exceptions. *Abbee v. Higgins*, 535

RECOVERY.

See PRACTICE, 17, 22.

REGISTER'S RECEIPT.

See EVIDENCE, 5.

REGISTRATION.

See CONVEYANCE.
LIEN.

RELEASE.

1. The construction of a release is a question of law to be determined by the court. *Knott v. Burlerson*, 600
2. Where legal terms are employed in a release, it must be presumed that the parties fully understood the legal import of the words, and the court will give effect to that understanding, *ib.*

See ACCORD AND SATISFACTION, 2.
PLEADING, 13, 19.

REPLEVIN.

1. In an action of replevin against

two or more, it is error to instruct the jury that, "If either of the defendants was not guilty, they must find for both; that one alone could not be found guilty." *Carothers v. Van Hagan*, 481

2. In an action of replevin commenced before a justice of the peace, where the plaintiff fails to prosecute his suit with effect, or adduce any proof in support of his action, the law presumes title to be in the defendant, and it is only necessary for him to prove the value of the property, in order to recover restitution or payment of its value. *Rackner v. Dixon*, 591

See BOND, 4.

PLEADING, 6, 13, 14.

RETURN.

See SHERIFF'S RETURN.

S

SCHOOL DISTRICT.

1. Where the inhabitants of a school district levied a tax upon themselves, and sufficient had been collected for the purpose of paying the teacher a balance his due, for which he had an order on the treasurer, and the officers of the district refused to pay the order after a proper demand, it was held that the teacher might recover, in an action upon the order against the district. *McCasky v. School District*, 482

SEAL.

See ATTESTATION, 2.

BOND, 1, 2.

SET-OFF.

1. Where the plaintiff in an action of right waives all but nominal damages, the defendant cannot introduce evidence of a set-off for improvements. *Daniels v. Bates*, 151
2. A mere right to a reduction of

plaintiff's demand, in consequence of defects in the work for which it was charged, is not a demand which can be brought in a set-off against plaintiff's demand. *Crookshank v. Mallory*, 257

3. A set-off must be predicated upon an independent demand, . . . *ib.*
4. Proof of a set-off may be excluded unless defendant has filed with his plea the particular items of his demand. *Chambers v. Games*, 320

See SETTLEMENT.

SETTLEMENT.

1. A note is *prima facie* evidence of a settlement between the parties to it, so as to exclude items of set-off, charged prior to the date of the note, unless the defendant first prove or offer to prove that such items were not included in the settlement upon which the note was given. *Smith v. Bissell*, 379

SHERIFF.

1. Where, on account of prejudice, interest, or other objection, the sheriff is rendered incompetent, the coroner should perform his duty; but if the party objecting to the sheriff asks the court to appoint an elisor, he, by implication, manifests an objection to the coroner also, which will justify the court in appointing an elisor. *Harriman v. The State*, . . . 270
2. Where a jury was summoned by the sheriff after the prisoner made affidavit that the sheriff was prejudiced against him, but the jury was not objected to until after the verdict, it was held that the objection came too late, and that the irregularity was waived, . . . *ib.*

SHERIFF'S DEED.

See DESCRIPTION.

SHERIFF'S RETURN.

1. A mere omission or irregularity in a sheriff's return cannot vitiate a

- sale made under execution, so as to invalidate the right of a *bona fide* purchaser. *Hopping v. Burnam*, 39
- 1a. Sheriff's returns of levy, &c., not essential to title, . . . *ib.*
 2. Where a sheriff's return of an execution sale does not show that notice of the sale was served upon execution defendant, it will not be presumed that notice was not given. *Corriell v. Doolittle*, . . . 385
 3. A sheriff's returns may be so amended as to set forth truthfully the facts of the service. *Patterson v. State of Indiana*, . . . 492
 4. Where it appears by the returns of the sheriff that a writ was served in the manner provided by statute, it is good, even if it should appear that the defendant had been three months absent from his dwelling. *Abbee v. Higgins*, . . . 535

See BOND, 4.

SLANDER.

1. P, in speaking of L, said, "He is a thief; he stole my wheat, and ground it, and sold the flour to the Indians;" held that these words are, *per se*, actionable in slander. *Parker v. Lewis*, . . . 311
2. Words actionable in slander by implication of law, are to be considered as false and malicious, unless the contrary is made to appear by the evidence, . . . *ib.*
3. In slander, where the words spoken are actionable *per se*, special damages need not be alleged or proved, *ib.*
4. It is no defence to an action of slander, that the slanderous words were spoken by the fireside of the defendant, in the presence of but two or three neighbors. This circumstance will not remove the presumption of malice. *Shaw v. Sweeney*, . . . 587
5. Exceptions to the general rule of presumptive malice explained, *ib.*

See EVIDENCE, 9.
PLEADING, 9.

SPECIFIC PERFORMANCE.

1. Where S agreed to deed a lot to L

- upon condition that he would make certain improvements and live upon the lot, it was held that if L performed the substantial conditions with ordinary diligence, he was entitled to a specific performance. *Shaw v. Livermore*, . . . 338
2. Equity will extend relief, even if there has not been a strict legal compliance with the terms of the contract, if it can be done consistently with the essence of the agreement, . . . *ib.*
 3. Where one of the conditions upon which a deed should be made was, that the purchaser should reside upon the lot, but the term of such residence was not designated, it was held that as the purchaser had complied with all the other conditions to secure title, and had resided upon the lot nearly two years before he left it, that such leaving would not be an abandonment, and that he was entitled to a deed, *ib.*
 4. The rescision or the specific performance of a contract is left to the sound discretion of the chancellor, to be exercised upon a consideration of the circumstances of each case, under applicable general rules of equity, . . . *ib.*
 5. The statute authorizes a proceeding against an executor or administrator for a conveyance in pursuance of a contract with the deceased. *Fulwider v. Peterkin*, . . . 522
 6. In a proceeding against an estate for a specific performance, it is not necessary to make the heirs a party to the conveyance, . . . *ib.*

STATUTE.

1. Legislation in derogation of trial by jury, and of proceedings according to the course of the common law, is in conflict with the ordinance of 1787, and therefore void. *Reid v. Wright*, . . . 15
2. An act of the legislature of the territory of Wisconsin, entitled, "An act for the partition of the half-breed lands, and for other purposes," approved January 16, 1838, and an act supplementary thereto, approved June 22, 1838, and also an act passed by the Iowa legislature, approved January 25, 1839, to repeal both of said acts, are repug-

nant to the ordinance of 1787, and also to the organic law of Wisconsin and Iowa, and are therefore void, *ib.*

3. So also are judgments rendered by virtue of said laws, *ib.*

4. No statute can constitutionally derogate a vested right. *Wright v. Marsh et al.*, 94

5. Statutes made to promote an impartial administration of justice should receive a liberal construction. *Lync et al. v. Hoyle et al.*, 135

6. No statute should have a retrospect beyond the period of its commencement, nor be so construed as to divest acquired rights. *Forsyth v. Ripley*, 181

7. Statutes *in pari materia* should be taken together as one law, and should, if practicable, be so construed that every provision shall continue in force. *Garriman v. The State*, 270

8. In a question of construction, all doubt should favor the validity of a law under which rights have been acquired, *ib.*

SUMMONS.

1. The amount of a plaintiff's claim need not be mentioned in the body of a summons from a justice of the peace; but the amount claimed, including interest and costs, should be indorsed upon the summons. *Hedinger v. Silsbee*, 363

2. The want of an indorsement of the amount of plaintiff's claim cannot be taken advantage of after the general appearance of the defendant. Such appearance waives the want of indorsement, *ib.*

See **CAPIAS**, 3.
WRITS.

SURVEYS.

1. Surveys made by the general government are public, and within the judicial knowledge of courts. *Wright v. Phillips*, 191

SUPREME COURT.

See **ATTORNEY**, 3.
INJUNCTION.
PRACTICE, 44.

T

TAX.

See **DEED**, 1.
SCHOOL DISTRICT.

TENDER.

1. If a debtor makes a tender of the specific articles he has promised, and properly designate and set them apart at the time and place stipulated, and the creditor is not there to receive, or refuses to accept the property, the debt is thereby discharged, and the property passes to the creditor. *Games v. Manning*, 251

TERMS OF COURT.

See **COURTS**, 2, 3, 7, 8, 9, 10.

TRANSCRIPT.

1. Where the transcript of a justice does not set forth the judgment *in hæc verba*, but contains sufficient to show its character, its amount and against whom it was rendered, it is sufficient to give the court jurisdiction. *Wilson v. Albright*, 125

See **JUSTICE OF PEACE**, 1.

TRESPASS.

1. The action of trespass *quare clausum fregit* is local, and can only be entertained by a justice of the county in which the land is situated. *Chapman v. Morgan*, 374

TRIAL.

See **PRACTICE**, 52, 62.

U

UNLAWFUL DETAINER.

1. In an action of unlawful detainer, a complaint is good which contains all the averments of facts required by statute. *Shaw v. Gordon*, 376

V

VARIANCE.

See PRACTICE, 63, 67.

VENUE.

1. If a criminal act has been committed in one county, and consummated in another, the offender may be indicted in either county. *Nash v. State*, 286
2. Where a mortal blow was inflicted in Scott, from which death took place in Muscatine county, it was held that the latter county had jurisdiction, *ib.*
3. The statute which provides that, "when a person shall commit an offence on board of any vessel or float, he may be indicted for the same in any county through any part of which such vessel or float may have passed on that trip or voyage," is not confined to that part of the trip or voyage which had been performed before the offence was committed, but it extends to the entire trip, *ib.*

See PLEADING, 8.

VERDICT.

1. A verdict defective in form, may be corrected by request or consent of the jurors at any time before they are dismissed and the verdict is recorded. *Wright v. Phillips*, 191
2. Where the declaration in slander contains several counts, two of which charge the speaking of words at different times, and a general verdict is rendered, the judgment will not be reversed. *Bradley v. Kennedy*, 231

See ACTION OF RIGHT, 5.
NEW TRIALS, 1, 2.

W

WARRANTY.

See DEED, 2, 3.

WILLS.

1. It will not be presumed that the probate of a will was granted without sufficient proof, nor that letters testamentary were issued without the bond required by law. *Barney v. Chittenden*, 165
2. Where it appears to the court that no person interested intends to object to the probate of a will, it may be granted upon the testimony of one subscribing witness, . . . *ib.*

WITNESS.

1. Where execution returns show that sufficient property was levied upon and appraised to satisfy the judgment, the constable who made the levy and return is not a competent witness to prove that the execution was not satisfied by the levy. *Lucas v. Cassaday*, 208
2. The payee of a note, which he indorsed to the holder, is a competent witness to prove usurious interest. *Richard v. Marshman*, 217
3. An attorney to whom a claim was intrusted for collection, and who employed another attorney to commence suit upon it, is not an incompetent witness. *Walsh v. Murphy*, 227
4. An attorney may be a witness for his client, *ib.*
5. Where property is taken from a borrower, M, by unavoidable force, and the bailor seeks to recover it in detinue from W, it was held that M is a competent witness for the bailor. *Wright v. Ross*, 266
6. A father may testify in a criminal case in behalf of his son. *Cass v. State*, 353
7. The question was put to a witness before a grand jury, "Do you know of any person, other than yourself,

being engaged in gaming at any time within two years in the county of Muscatine?" held, that witness could not refuse to answer on the ground that it would have a tendency to implicate himself. *Richman v. State*, 532

8. A witness cannot be justified in refusing to answer questions which cannot, from their nature, tend to criminate him; and of such a question he cannot be the judge, *ib.*
9. Where, from the nature of the question, the answer would inevitably criminate the witness, he is sole judge, and may answer or refuse to answer the question, *ib.*
10. A joint debtor has a contingent demand against his co-debtor, which is provable under the fifth section of the general bankrupt law, and is barred by a certificate of bankruptcy; such bankrupt is therefore a competent witness in an action against his co-debtor. *Frentress v. Markle*, 553

See EVIDENCE, 9.
EXECUTION.
INDICTMENT, 6.
WILLS, 2.

WRITS.

1. In the district court all writs should be made returnable to the first day of the term; but if a writ is defective in this particular, it may be

corrected by the court, or cured by the appearance of the defendant. *Graves v. Cole*, 467

2. If a writ of attachment is made returnable to the third day of the term, it is doubtful whether it would justify the court in dissolving the attachment lien, *ib.*
3. A writ is not served upon a party in the manner provided by statute by "leaving an attested copy at his place of residence, with a member of the family over the age of fifteen years," unless the contents of the writ are stated. *Diltz v. Chambers*, 479

See ATTESTATION, 2.
SHERIFF'S RETURN.

WRITS OF ERROR.

1. The time of suing out a writ of error is determined by the date of its service upon the clerk to whom it is directed. *Wright v. Hughes*, 142
2. All co-parties to a judgment, who are entitled to a writ of error, must be joined as plaintiffs in the writ; and if either of them refuses to join, still his name may be used by giving him a bond to indemnify him against damages and costs. *Huner v. Reeves*, 190
3. Where a party sues out a writ of error *coram nobis*, but does not give the notice as required by statute, the judgment may be affirmed. *Mears v. Garretson*, 316

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